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75-6568

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. A - 782

JOHNNIE B. HANKERSON,

Petitioner

-against-

STATE OF NORTH CAROLINA

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

The Petitioner, Johnnie B. Hankerson, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina filed on December 17, 1975.

CITATIONS TO OPINIONS BELOW

The decision of the Supreme Court of North Carolina is reported in 288 N.C. 632 (1975); a copy of said decision is attached hereto as Appendix A. The earlier decision of the North Carolina Court of Appeals denying petitioner's appeal is reported in 26 N.C. App. 575, 217 S.E. 2d 9 (1975).

JURISDICTION

On December 17, 1975 the Supreme Court of North Carolina entered judgment confirming the conviction of petitioner for second degree murder. Jurisdiction to review the judgment of the Supreme Court of North Carolina is conferred upon this Court by Title 28, United States Code, Section 1257 (3).

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SUPREME COURT OF THE UNITED STATES

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

JOHNNIE B. HANKERSON,
Petitioner

vs.

STATE OF NORTH CAROLINA

Petitioner, Johnnie B. Hankerson, who is now held in Central Prison, Raleigh, North Carolina, a penal institution of the State of North Carolina, asks leave to file the attached Petition for a Writ of Certiorari to the Supreme Court of North Carolina without payment of costs and to proceed in forma pauperis. The Petitioner's affidavit in support of this petition is attached hereto.

J. T. Vedrine
Counsel for Petitioner

AFFIDAVIT IN SUPPORT OF PETITION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

JOHNNIE B. HANKERSON,
Petitioner

vs.

STATE OF NORTH CAROLINA

I, Johnnie B. Hankerson, being first duly sworn according to law, depose and say that I am the petitioner in the above-entitled cause, and, in support of my application for leave to proceed without being required to prepay costs or fees, state:

1. Because of my poverty I am unable to pay the costs of said cause.

2. I am unable to give security for the same.

3. I believe that I am entitled to the redress I seek in said cause.

4. The nature of said cause is briefly stated as follows:

I was sentenced to the Penitentiary of the State of North Carolina by the Superior Court of Nash County, North Carolina. The present proceeding was commenced on my appeal to the Court of Appeals of North Carolina and subsequently to the Supreme Court of North Carolina to set aside the judgment of the Superior Court of Nash County, North Carolina and to grant a new trial on the grounds that the instructions of the trial Judge to the jury violated my constitutional rights under the Fourteenth Amendment to the United States Constitution.

Johnnie B. Hankerson
Petitioner

NORTH CAROLINA

Wake COUNTY

Sworn to and subscribed before me,

a Notary Public, this the 5 day of

April, 1976.

Edward E. Hodge

. Notary Public

My commission expires: My Commission Expires October 6, 1980

QUESTIONS PRESENTED

1. Whether the denial of the application of Mullaney v. Wilbur, 421 US 684, 44 L Ed 2d 508, 95 S Ct _____, (1975), (hereinafter, "Mullaney") to petitioner's case by the Supreme Court of North Carolina deprived petitioner of due process of law for the reason that petitioner was found guilty of second degree murder by a jury that was charged that petitioner had the burden of proof to the satisfaction of the jury of the defense of self-defense?

2. Whether petitioner was deprived of due process of law by the decision below for the reason that petitioner was found guilty of second degree murder by a jury that was charged that mandatory presumptions of malice and an unlawful killing were raised in favor of the State upon the proof by the State beyond a reasonable doubt or admission by petitioner that he intentionally inflicted a wound upon the deceased with a deadly weapon which proximately resulted in death?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Amendment Fourteen:

"No state shall... deprive any person of life, liberty or property, without due process of law; ...."

STATEMENT OF FACTS

On September 29, 1974, petitioner was arrested and taken into custody on the charge that he did unlawfully, willfully, and feloniously and of his malice aforethought kill and murder Gregory Eugene Ashe in violation of North Carolina General Statute 15-144. This charge resulted from the death of Gregory Eugene Ashe on said date from a wound caused by a bullet fired from a pistol. Petitioner and his attorney waived the finding and return into Court of a Bill of Indictment and agreed that the case be tried upon information alleging that on or about the 29th day of September, 1974, in Nash County, petitioner unlawfully and willfully did feloniously and with malice by the use of a deadly weapon, to wit a pistol, kill and murder Gregory Eugene Ashe contrary to the form of a statute in such case made and provided against the peace and dignity of the State. At the November 18, 1974, Session of Nash County Superior Court, upon his plea of not guilty, petitioner was tried and convicted of second degree murder and sentenced to a term of not less than twenty (20) nor more than twenty

five (25) years in the State's prison.

Evidence for the State at trial tended to show the following facts. Gregory Ashe died September 29, 1974 as the result of a gunshot wound to the heart. The deceased and some friends had been together on the night in question and upon the failure of Ashe being able to "crank" his car, his companions started walking away from the car. As Ashe went back to "crank" the car, the friends heard a gunshot, heard Ashe exclaim he was shot, and saw a yellow Plymouth "Satelite" speed away from the scene. After some difficulty in finding Ashe due to the darkness of the night, he was found lying face down in a nearby field with a cigarette that had been lit in his hand. After determining that the automobile seen leaving the scene belonged to petitioner, law enforcement officers went to his home where petitioner gave the following story. Petitioner said that he was riding slowly near where Gregory Ashe was shot when someone asked him for a light. He stopped and gave his cigarette lighter to a black male, and when he reached to put the lighter back in its holder, he felt someone shaking the right front door that was locked. Petitioner further stated that he was then grabbed by the person to whom he had given a light who also put a knife to his throat. Petitioner stated that he then picked up a gun from the right front seat of his car and shot at his assailant before speeding away. A law enforcement officer searched petitioner's car and found a knife on the seat to the right of the driver's seat. Petitioner gave the officer a shirt and showed him grease marks on the shirt which he stated were left by the person who had grabbed him. Witnesses for the State testified that the deceased had never been seen with a knife like the one found on the seat of the car. Blood was observed on the driver's side of the car, just behind the door.

Evidence for petitioner consisted of petitioner's account of the shooting as given to the officer and testimony by his family that upon coming home he admitted that he had shot at someone after having a knife put to his neck. Petitioner testified that he did not own the knife found in his car and members of his family stated that they had never seen him with a knife like the one found on the front seat of the

car. Petitioner surmised that his assailant dropped the knife in the car. A number of witnesses testified concerning petitioner's good character.

Petitioner gave notice of appeal to the North Carolina Court of Appeals which appeal was argued in the North Carolina Court of Appeals on May 29, 1975. The North Carolina Court of Appeals upheld the Judgment of the trial court with a dissent by Judge Arnold in its decision of July 16, 1975, certified July 28, 1975. Petitioner appealed to the Supreme Court of North Carolina as a matter of right pursuant to North Carolina General Statute 7A-30, which statute grants an appeal as a matter of right from the North Carolina Court of Appeals to the Supreme Court of North Carolina in all cases in which there is a dissent. Petitioner's appeal to the Supreme Court of North Carolina was filed in that court on July 31, 1975. On August 19, 1975 petitioner filed in the Supreme Court of North Carolina a Motion to Amend the Record to note additional exceptions and assignments of error which would raise for review additional questions suggested by this court in Mullaney decided on June 9, 1975. Petitioner's Motion to Amend the Record to note additional exceptions and assignments of error was allowed on September 2, 1975, and the case was argued in the Supreme Court of North Carolina on September 10, 1975. The Supreme Court of North Carolina denied petitioner's appeal in a decision filed December 17, 1975 and reported in 288 N.C. 632. Petitioner made application to this court through counsel for an Extension of Time Within Which to File Petition for Writ of Certiorari. Said application was granted by an Order of Chief Justice Warren E. Burger dated March 12, 1976 which orders that the time for filing a Petition for Writ of Certiorari is extended to and including April 15, 1976.

REASONS FOR GRANTING THE WRIT

I

The decision below affirms the conviction of petitioner by a jury which was instructed that the petitioner had the burden of proof to the satisfaction of the jury in proving the defense of self-defense to show a justifiable homicide.

In State v. Hankerson, 288 NC 632, ____ S. E. 2d ____ (1975), (hereinafter "Hankerson") the Supreme Court of North Carolina, (hereinafter, "the state court"), following the decision of this court in Mullaney, overruled a longstanding rule in North Carolina that the defendant carried the burden of proving the defense of self-defense. Quoting from the decision of State v. Barrett, 132 NC 1005, 48 S.E. 832 (1903), the state court in Hankerson restated the law in North Carolina prior to Hankerson:

> "[T]he prisoner must satisfy the jury, neither by a reasonable doubt nor yet by a ponderance of the evidence, but simply satisfy them, of the existence of facts and circumstances which mitigate the offense or which make good a plea of self-defense." Hankerson, at 648.

This court in Mullaney held that the Maine rule that required a defendant charged with murder to prove that he acted in the heat of passion on sudden provocation in order to reduce the homicide to manslaughter did not comport with the requirement of the due process clause of the Fourteenth Amendment which requires that the prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime charged. In Hankerson the State Court interpreted the law in North Carolina in regards to Mullaney as follows:

> "[T]he State must bear the burden throughout the trial of proving each element of the crime charged including, where applicable, malice and lawfulness beyond a reasonable doubt. The decision permits the State to rely on mandatory presumptions of malice and unlawfulness upon proof beyond a reasonable doubt that the defendant intentionally inflicted a wound upon the deceased with a deadly weapon which proximately resulted in death. If after the mandatory presumptions are raised, there is no evidence of heat of passion killing on sudden provocation and no evidence that the killing was in self-defense, Mullaney permits and our law requires the jury to be instructed that the defendant must be convicted of murder in the second degree. If, on the other hand, there is evidence in the case of all of the elements of heat of passion on sudden provocation the mandatory presumption of malice disappears but the logical inference from the facts proved remain in the case to be weighed against the evidence. If upon considering all the evidence, including the inference and the evidence of heat of passion, the jury is left with a reasonable doubt as to the existence of malice it must find the defendant not guilty of murder in the second degree and should then consider whether he is guilty of manslaughter. If there is evidence in the case of all the elements of self-defense, the mandatory presumption of unlawfulness disappears but the logical inference from the facts proved may be weighed against the evidence. If upon considering all of the evidence, including the inferences and evidence of self-defense the jury is left with a reasonable doubt as to the existence of unlawfulness it must find the defendant not guilty." State v. Hankerson, 288 NC 632, 651-652, _____ S.E. 2d _____ (1975).

With regard to removing the burden of proving self-defense from the defendant back to the State, the state court upheld the contentions of petitioner. However, the state court declined to give its decision in Hankerson retroactive effect, denying even the limited retroactive effect of applying the new rule to the parties then before the court. While noting that Mullaney relied heavily on In Re Winship, 397 U.S. 358 (1970), which was held to be retroactive in Ivan v. City of New York, 407 U.S. 203, (1972), the state court declined to give any retroactive effect to Mullaney "without further guidance from the Supreme Court ..." and expressed its hope "that the Supreme Court will eventually determine that the decision applies prospectively only." Hankerson, at 652.

The state court noted that the United States Supreme Court in determining whether a new rule of constitutional proportions is given retroactive effect has considered three factors: (1) The purpose to be served by the new rule, (2) The extent of reliance on previous decisions even though the new rule may have been "foreshadowed" by intervening cases, and (3) The effect on the administration of justice of retroactive application. Hankerson, at 652-653.

The state court acknowledged that the first consideration was the most important and conceded that the purpose of the rule in Mullaney weighs in favor of retroactive activity. Hankerson, at 655. The state court, however, gave more weight to the other factors and declined to give Mullaney any retroactive effect.

Thus the state court affirmed petitioner's conviction by a jury which had been instructed that the burden of self-defense was on petitioner. This court has said that in the areas in which constitutional rules have been applied retrospectively, the principle that was "applied went to the fairness of the trial — the very integrity of the fact-finding process." Linkletter v. Walker, 381 US 618, at 639, 14 L Ed 2d 601, 85 S Ct 1731 (1965). Petitioner contends that his conviction based upon the instructions given the jury was a violation of his

constitutional rights under the Fourteenth Amendment which went directly to the fairness of his trial. For as this Court stated in Mullaney, "the result, in a case such as this one where the defendant is required to prove the critical fact in dispute, is to increase further the likelihood of an erroneous murder conviction." Mullaney, 44 L. Ed. 2d 508, 520-521.

This court in Mullaney also noted the emphasis by the court in In Re Winship that, "the requirement of proof beyond a reasonable doubt has [a] vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction." In Re Winship, 397 U.S. 358, at 363, 25 L. Ed. 2d 368, 90 S Ct 1068 (1970).

II

The decision below affirms the conviction of petitioner by a jury that was instructed that mandatory presumptions of malice and unlawfulness were raised in favor of the state upon petitioner admitting that he inflicted a wound upon the deceased with a deadly weapon that proximately caused his death.

The jury in petitioner's case was given the following instructions as quoted by the state court:

> "If the State proves beyond a reasonable doubt or it is admitted that the defendant intentionally killed Gregory Ashe with a deadly weapon, or intentionally inflicted a wound upon Gregory Ashe with a deadly weapon, that proximately caused his death, the law raises two presumptions; first that the killing was unlawful, and second, that it was done with malice. Then, nothing else appearing, the defendant will be guilty of second degree murder ...." Hankerson, at 642.

In his Motion to Amend the Record to note additional exceptions and assignments of error based upon Mullaney, which motion was allowed, petitioner assigned as error the above quoted instructions. Petitioner contended in the state court, and still contends, that the mandatory presumptions of an unlawful killing and malice raised in favor of the State violate Fourteenth Amendment Due Process under Mullaney.

Petitioner contends that the mandatory presumptions of unlawfulness and malice raised by an intentional killing with a deadly weapon are violative of due process since they required petitioner to carry the burden of proof of negating essential elements of the crime, unlawfulness and malice. Mullaney requires that procedural devices such as inferences and presumptions satisfy certain due process requirements. Mullaney, 44 L. Ed. 2d 508 at 522, n. 31. Petitioner contends that the mandatory presumptions of unlawfulness and malice fail to satisfy these requirements.

Since the North Carolina presumptions of malice and unlawfulness raised by an intentional killing with a deadly weapon are mandatory, these presumptions did more than just require petitioner to go forward with the evidence, they in effect shifted the burden of proof to petitioner of proving the absence of two of the essential elements of the crime. These presumptions joined with the requirement that petitioner bear the burden of proof to the satisfaction of the jury of self-defense, and caused one to amplify the other. Petitioner contends that these mandatory presumptions were as violative of due process as was the rule that required him to bear the burden of proving self-defense.

III

Petitioner properly raised the errors in his litigation, and no final judgment had been entered in petitioner's case when the decision in Mullaney was rendered.

The state court made no reference to the status of the petitioner's case so far as the timeliness of his objection to the instructions were concerned other than to allow petitioner's Motion to Amend the Record to note additional exceptions and assignments of error based upon Mullaney. In North Carolina objections to the charge to the jury on the law are not required to be made at the time an erroneous charge is made, an exception and assignment of error being sufficient. Rice v. Swannanoa-Berkeley Hotel Co. 209 NC 519, 183 S. E. 3 (1936); North Carolina General Statute 1A-1, Rule 46(c). The decision in Mullaney was rendered after the petitioner's appeal was argued in the North Carolina Court of Appeals, and before the decision of the North Carolina Court of Appeals was made denying petitioner's appeal with one Judge dissenting. North Carolina General Statute 7A-30 gives an appeal of right (emphasis added) to the Supreme Court of North Carolina from the North Carolina Court of Appeals when any one of the three Judges who heard the case in the North Carolina Court of Appeals dissents.

Petitioner gave notice of appeal as a matter of right to the Supreme Court of North Carolina and thereafter filed a Motion to Amend the Record bringing to light the constitutional questions raised by Mullaney. The State objected to petitioner's Motion to Amend the Record, but the Supreme Court of North Carolina allowed the Motion, and the record was amended to note the new exceptions and assignments of error to the judge's charge based upon Mullaney. Therefore, the question of the timeliness of petitioner's exception and assignments of error to the charge were raised and considered by the Supreme Court of North Carolina, and the question of the timeliness was decided in petitioner's favor.

The state court in Hankerson made no reference to the status of petitioner's case regarding the finality of any judgment therein. The state court did not address itself to any question of giving Mullaney a limited retroactive effect so as to apply Mullaney to petitioner's case or other cases in which a final judgment had not been rendered.

Petitioner contends that even if Mullaney is not given full retroactive effect, then at least it should be given retroactive effect to cases, like petitioner's, which were still pending at the time of the decision in Mullaney. Linkletter v. Walker, 381 U. S. 618 (1965); United States v. Schooner Peggy, 1 Cranch 103, 2 L ed 49 (1801). Petitioner's case was still being appealed as a matter of right, and even following that appeal, the door was open for petitioner to make this Petition for Writ of Certiorari if the Supreme Court of North Carolina should, as it did, deny his appeal. The effects on the administration of justice of a retroactive application of Mullaney would be greatly diminished if the state court had considered this limited retroactive application. Petitioner does not concede that Mullaney should not be given full retroactive application based upon the prior decisions of this court; but petitioner does ask in the alternative that a limited retroactive application be granted to his case which was still pending when Mullaney was decided if full retroactive application of Mullaney is denied.

CONCLUSION

For the foregoing reasons, the Petitioner Johnnie B. Hankerson requests that a Writ of Certiorari issue to review the judgment of the Supreme Court of North Carolina.

Respectfully submitted

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Telephone (919) 977-1911
Attorney for Petitioner

Dated: April 9, 1976

Otherwise, a plea of double jeopardy upon retrial may present serious problems.

For the reasons stated, I respectfully dissent from the majority opinion and vote to affirm the decision of the Court of Appeals.

Justices COPELAND and EXUM join in this dissent.

STATE OF NORTH CAROLINA v. JOHNNIE B. HANKERSON

No. 56

(Filed 17 December 1975)

1. **Criminal Law § 90— State's introduction of exculpatory statements by defendant**

The State is not bound by the exculpatory portions of a confession which it introduces in a homicide case if there is other evidence tending to throw a different light on the circumstances of the homicide.

2. **Homicide § 21— second degree murder — exculpatory statements — sufficiency of evidence for jury**

The State's evidence was sufficient for the jury in this prosecution for second degree murder, notwithstanding the State introduced exculpatory statements by defendant that he shot the victim while the victim was reaching into defendant's car with a knife at defendant's throat and a hand on his chest, where the State's evidence cast doubt on defendant's version by tending to show that (1) defendant fled the scene at a great rate of speed; (2) defendant originally lied about the gun used in the shooting and told the truth about it after his wife turned it in to the police; (3) deceased had no grease on his hands although defendant claimed a grease spot on his shirt was from being grabbed by the victim; (4) the victim was found with a cigarette in one hand although defendant contended the victim used two hands against him; (5) the victim was right handed and defendant claimed the victim wielded the knife with his left hand; (6) defendant said he was stopped by two persons while the State's evidence was that the victim was alone; and (7) the victim had never been seen with a knife similar to one recovered from defendant's vehicle.

3. **Criminal Law § 86— prior misconduct — question in good faith**

Defendant failed to show that the district attorney's question to him on cross-examination as to how many people he had shot before was asked in bad faith.

4. **Criminal Law § 162— failure to strike testimony — absence of motion to strike**

The trial court did not err in failing to strike defendant's testimony regarding prior arrest which did not result in conviction where [illegible] motion to strike such testimony.

5. **Criminal Law § 113— recapitulation of evidence — misstatement — collateral matter**

The trial court's inaccurate statement during recapitulation of the evidence in a homicide case that defendant testified he had been convicted of assault was a misstatement upon a collateral matter and not a ground for a new trial since no request for correction was made before the case was submitted to the jury.

6. **Homicide § 28— final mandate — absence of acquittal by self-defense — additional instructions**

In this homicide prosecution, the trial court's error in failing to include in its final mandate the theory of acquittal by reason of self-defense was cured by additional instructions given by the court after the jury had begun its deliberations.

7. **Homicide §§ 14, 24— absence of malice — self-defense — burden of proof on defendant — unconstitutionality — nonretroactivity**

Under the decision of *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the Due Process Clause of the Fourteenth Amendment prohibits the use of our long-standing rules in homicide cases that, in order to rebut the presumption of malice, defendant must prove to the satisfaction of the jury that he killed in the heat of a sudden passion, and in order to rebut the presumption of unlawfulness, defendant must prove to the satisfaction of the jury that he killed in self-defense. However, the *Mullaney* decision is not retroactive and applies only to trials conducted on or after 9 June 1975.

8. **Homicide §§ 14, 24— presumption of malice and unlawfulness — constitutionality**

The *Mullaney* decision does not preclude use of the presumptions of malice and unlawfulness upon proof beyond a reasonable doubt of a killing by the intentional use of a deadly weapon; nor does it prohibit making the presumptions mandatory in the absence of contrary evidence or permitting the logical inferences from facts proved to remain and be weighed against contrary evidence if it is produced.

Justice LAKE concurring in result.

APPEAL by defendant pursuant to N. C. Gen. Stat. 7A-30(2) to review the decision of the Court of Appeals reported in 26 N.C. App. 575, 217 S.E. 2d 9 (1975), which found no error, *Arnold, J.*, dissenting, in the trial before *Webb, J.*, at the November 21, 1974 Session of NASH County Superior Court.

After the appeal was filed in this Court on July 31, 1975, defendant moved to amend the record on August 19, 1975, to note additional exceptions and assignments of error which would raise for review additional questions suggested by *Mullaney v. Wilbur*, 421 U.S. 684, decided on June 9, 1975. This motion was allowed on September 2, 1975, and the case argued on September 10, 1975.

BEST COPY AVAILABLE

Defendant was charged with the second degree murder of Gregory Ashe and entered a plea of not guilty. It was stipulated that had Dr. D. E. Scarborough, who performed the post-mortem examination, been present at trial he would have testified that Gregory Ashe died on September 29, 1974, as a result of massive hemorrhage resulting from a gunshot wound to the heart.

Evidence for the State tended to show that on the night of September 29, 1974, Lorenzo Dancy, Wilbert Whitley, and the deceased, Gregory Ashe, left a dance hall and drove to a poolroom in Whitakers. Ashe was driving his car. Upon arrival at the poolroom, they discovered that it was closed. Ashe was unable then to restart his car. Ashe asked Dancy and Whitley for a match to light a cigarette. Neither had a match. Whitley announced that he was going to his home, one block away, and began walking. Dancy and Ashe were also walking away from the car when Ashe said that he was going back to "crank" the car. Dancy indicated that he was going on with Whitley. Dancy testified that he yelled for Whitley to wait and then proceeded to walk after Whitley. When last seen alive by Dancy, Ashe was seen walking alone back towards his car.

Moments later Dancy and Whitley each heard a gun fire. Dancy heard Ashe exclaim that he was shot and hollered this information to Whitley. A yellow and black Plymouth "Satellite" was observed pulling away at a fast rate of speed. It did not stop when it reached the nearby intersection of U. S. 301. Dancy and Whitley had differing accounts of whether the car left before or after Dancy hollered.

The shooting had occurred some time after 11:00 o'clock. Because of the darkness it was difficult to find Ashe. Around 12:00 o'clock, Ashe was discovered lying face down in a field about thirty feet from the road. A cigarette, which had been lit but which was now out, was in Ashe's hand. The body was removed at 4:00 or 5:00 o'clock that morning.

After determining the identity of the owner of the Plymouth, several law enforcement officers, including Deputy Sheriff M. M. Reams went to defendant's home, advised defendant of his rights, and questioned him. Defendant told Deputy Reams that he had been to Whitakers, had shot a person who had grabbed him and tried to cut his throat but did not know whether he had hit him. Reams testified that defendant's car was

searched with his consent and a knife was found in the middle of the front seat. Also found in the car was a ".30-06," ammunition for the ".30-06," and a hunting knife. Blood was observed on the driver's side of the car, just behind the door. Defendant gave Reams a shirt with a grease spot and stated that was where he had been grabbed. When asked about the pistol used in the shooting *(not* the ".30-06"), defendant told Reams that he was "in the process of buying" it but had already returned it to the seller, whom he refused to identify.

On cross-examination Reams gave this additional account of defendant's statements: Defendant was driving his Plymouth "Satellite" automobile near the poolroom when a man stopped him and asked him for a light. Defendant gave the man the cigarette lighter from the dash of his automobile. Defendant felt someone "shaking the car, shaking the right door that was locked." Defendant put the cigarette lighter back in the holder and when he turned around "the man" was reaching in with a knife at his throat and had a hand on defendant's chest. Defendant reached down, got a revolver, and "shot the man who already had his hand on his left chest."

Officer Reams also testified that after taking defendant's statement he returned to the morgue and examined the deceased's hands. He found no grease on them. Several witnesses for the State testified that they had never seen the deceased with a knife like the one in evidence found in defendant's car.

Defendant testified giving the following account of the incident: He was driving his Plymouth automobile slowly over a road containing large holes when someone asked for a light. Through his car mirror, defendant could see two men. One of them walked up to the car and defendant reached over to the dash of the car, pushed in the cigarette lighter, and gave the lighter to him. On returning the lighter to its holder, defendant felt the car move, and looked and noticed the second man standing on the right-hand side of the car. As he turned back to his left, the first man reached into his car, seized him by the left shoulder with his right hand and put a knife to defendant's throat with his left hand. Defendant felt the knife at his throat, grabbed his gun and shot. He surmised that his assailant dropped his knife in the car since it did not belong to the defendant.

Defendant admitted that he lied to the police about the whereabouts of the gun. He said:

> "The pistol was in my house at the time the law came there. He did ask me for the pistol then. I told him I had returned it to the person I got it from. I had not returned it. It was in the house right then.
>
> * * * *
>
> "The reason I didn't tell the Sheriff the truth about where the pistol was was because at that time I just wasn't thinking, but after I got up here in jail I decided I might as well go ahead and tell them. My wife had already given it to the officers at that time. It is true that I never told them where the pistol was. If they had wanted to search the house they could have found it right there under the mattress. I did not hide the gun. That was just to keep it away from the children."

Defendant's wife, however, testified that she got the pistol from defendant's drawer where "I am sure he put it."

In rebuttal the State introduced evidence that Gregory Ashe was right-handed.

The jury found defendant guilty of second degree murder. He was sentenced to not less than 20 nor more than 25 years imprisonment. The Court of Appeals found no error, Arnold, J., dissenting.

Rufus L. Edmisten, Attorney General, by Claude W. Harris, Assistant Attorney General, for the State.

L. G. Diedrick, W. O. Rosser and Roland Braswell, Attorneys for defendant appellant.

EXUM, Justice.

I

Defendant assigns as error the denial of his motions for judgment as of nonsuit. Judge Arnold's dissent was on the basis that nonsuit should have been allowed. Reviewing this assignment, we consider all of the evidence actually admitted, whether from the State or defendant, in the light most favorable to the State, resolve any contradictions and discrepancies therein in the State's favor, and give the State the benefit of all reasonable inferences from the evidence. *State v. Cutler*, 271 N.C. 379, 382, 156 S.E. 2d 679, 681 (1967). Defendant more specifically urges that this case comes within the rule that, "[w]hen the State introduces in evidence exculpatory statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by these statements. While the intentional killing of another with a deadly weapon raises the presumption that the killing was unlawful and done with malice, this rule of law does not mean that the burden of showing an unlawful killing does not rest with the State. When the State's evidence and that of the defendant are to the same effect and tend only to exculpate the defendant, motion for nonsuit should be allowed. *State v. Carter*, 254 N.C. 475, 119 S.E. 2d 461." *State v. Johnson*, 261 N.C. 727, 730, 136 S.E. 2d 84, 86 (1964).

In *State v. Johnson, supra*, a murder prosecution, the State's only evidence that defendant committed a homicide was a confession that established a perfect self-defense. Circumstantial evidence corroborated the confession. Defendant's evidence at trial was to the same effect. In this context we held defendant entitled to a nonsuit and reversed a conviction for manslaughter. *State v. Carter, supra*, presented basically the same situation. There was no evidence which tended to contradict or impeach defendant's confession or testimony at trial that she acted lawfully in the defense of another.

[1] The State contends, however, and we agree that this case falls more squarely within the rule that the State is not bound by the exculpatory portions of a confession which it introduces, if there is "other evidence tending to throw a different light on the circumstances of the homicide." *State v. Bright*, 237 N.C. 475, 477, 75 S.E. 2d 407, 408 (1953); see also *State v. Bolin*, 281 N.C. 415, 189 S.E. 2d 235 (1972) and *State v. Cooper*, 273 N.C. 51, 159 S.E. 2d 305 (1968). In *State v. Bright, supra*, the State introduced defendant's statement that he killed his wife accidentally while they were scuffling on the bed. We held, however, that evidence "such as the absence of powder burns, the location and direction of the fatal wound, [and] the conduct of the defendant . . ." was sufficient to survive a motion for nonsuit, and we affirmed a manslaughter conviction.

[2] We hold that nonsuit in this case was properly denied in view of evidence which casts doubt on defendant's version of the incident. This evidence is to the effect that: (1) defendant fled the scene at a great rate of speed; (2) defendant originally

lied about the gun and decided to tell the truth about it after his wife had turned it in to the police; (3) the deceased had no grease on his hands although defendant claimed the grease spot on his shirt was from being grabbed by the deceased; (4) the deceased was found with a cigarette in one hand, although defendant claims the deceased used two hands against him; (5) the deceased was right-handed although defendant claims that deceased wielded the knife with his left hand; (6) defendant says he was stopped by two persons while the State's evidence was that the deceased, when last seen alive moments before the shooting, was alone; (7) the deceased had never been seen with a knife in his possession similar to the one recovered from defendant's vehicle.

While none of these circumstances taken individually flatly contradicts defendant's statement, taken together they are sufficient to "throw a different light on the circumstances of the homicide" and to impeach the defendant's version of the incident. The State is not bound, therefore, by the exculpatory portions of defendant's statement. The case is for the jury.

II

On cross-examination of the defendant by the district attorney the following occurred:

"Q. How many people have you ever shot before?

OBJECTION: OVERRULED: EXCEPTION

DEFENDANT'S EXCEPTION NO. 3.

Q. Go ahead and tell us exactly how many?

A. I have shot one.

Q. Is that all?

A. Two.

Q. Is that all?

A. Yes."

As the cross-examination continued without further objection defendant admitted having been "convicted of whiskey" and "convicted one time of escaping from prison. . . . I have not been convicted of anything else. I have been up once before in North Carolina for assault; this is the second time. That was

for shooting. It was in self-defense. I came clear of that." On recross-examination the defendant testified: "I have not been previously convicted of assault. They kept me in jail three or four nights the time the man was hitting me with a stick. Years back a fellow whacked me with a knife and he was shot in the leg but I didn't go to jail for it. I just paid his hospital bill." Apparently with reference to this testimony the trial judge, summarizing the evidence, stated to the jury that the defendant "testified that he had once been convicted of escape and once he was convicted of assault, and you will recall the things he said he had been convicted for."

Defendant now assigns as error: first, the overruling of his objection to the district attorney's question, "How many people have you ever shot before?"; second, failure of the court to strike "defendant's testimony as to any prior arrests that did not result in a conviction"; and third, the statement of the trial judge hereinabove set out recapitulating the testimony of the defendant.

[3] With regard to the district attorney's question defendant properly concedes the right of the State to cross-examine defendant as to specific acts of misconduct, *State v. Gainey*, 280 N.C. 366, 185 S.E. 2d 874 (1972), and properly concedes that unlawfully shooting other people would be such misconduct. Defendant contends, however, that the question was patently asked in bad faith since the district attorney must have been aware that the defendant was acquitted of that charge. Defendant, however, testified that he had shot people on *two* other occasions only one of which resulted in an acquittal by reason of self-defense. There is no showing in the record that the district attorney in fact knew the official outcome of these assaults. Apparently one of them never came to trial.

[4] As to the trial judge's failure to strike defendant's testimony regarding prior arrests which did not result in convictions, suffice it to say there was no motion to strike any of this testimony. Apparently defendant was satisfied at trial with his full explanation before the jury of the outcome of the two shooting incidents. The trial judge was not required, *sua sponte*, to strike this testimony. *State v. Battle*, 267 N.C. 513, 148 S.E. 2d 599 (1966).

[5] Although defendant admitted he paid hospital bills for one of his victims, he said also that he "didn't go to jail for

it" and that he had "not previously been convicted of assault." The trial judge did, it seems, inaccurately recapitulate the defendant's testimony on this point. The misstatement is understandable. Nevertheless "inaccurate statements of this character are not ground for a new trial unless called to the court's attention with request that correction be made before the case is submitted to the jury." *State v. Revis*, 253 N.C. 50, 53, 116 S.E. 2d 171, 174 (1960). In *State v. Cantrell*, 230 N.C. 46, 51 S.E. 2d 887 (1949) relied on by defendant on this point, defendant was tried on a charge of carnally knowing his ten year old child. In dictum this Court volunteered the observation that it would have been error for the trial judge to say, in recapitulating the evidence, that defendant "admitted . . . he had been tried and convicted of an assault with intent to commit rape on his daughter Dorline Shelton" unless such an admission appeared in the record. (It does not appear in the opinion but the record reveals that Dorline Shelton was not the prosecutrix, but another daughter of the defendant.) Noting that no exception was taken or assignment of error directed to this portion of the charge, this Court recognized that the defendant may indeed have made such an admission although none appeared in the record. Assuming the correctness of this dictum, the supposed misstatement there considered is clearly distinguishable from the one here. In prosecutions for various kinds of illicit sexual activity, our decisions have been characterized as being "markedly liberal in holding evidence of similar sex offenses admissible" on the question of guilt. 1 Stansbury's North Carolina Evidence 299 (Brandis Rev. 1973). It might then be considered that the assumed misstatement in *Cantrell* was one of a fact bearing directly on defendant's guilt. This Court has said that "a statement of a material fact not shown in the evidence constitutes reversible error" whether or not called to the trial court's attention. *State v. McCoy*, 236 N.C. 121, 124, 71 S.E. 2d 921, 923 (1952). The misstatement here complained of was clearly upon a collateral matter.

These assignments of error are, consequently, overruled.

III

[6] In his final mandate the trial judge failed to reiterate and specify that self-defense was a possible theory of acquittal. Defendant contends that under *State v. Dooley*, 285 N.C. 158, 203 S.E. 2d 815 (1974) this is reversible error. After the jury had been deliberating approximately forty-five minutes, however, they returned to the courtroom to ask for clarification on the distinction between manslaughter and murder in the second degree. In the course of his instructions responsive to this inquiry the trial judge charged in addition as follows:

> "Also, I want to instruct you that the charge I gave you as to self-defense would apply equally to manslaughter as it would to second degree murder in that if you find the defendant was justified or excused in the killing because he was acting in self-defense then you would find him not guilty as to either one."

While *Dooley* does require the trial judge to include in his final mandate the theory of acquittal by reason of self-defense where it has been raised by the evidence, failure here to do so was cured, in our opinion, by the additional instructions. *State v. Brooks*, 225 N.C. 662, 36 S.E. 2d 238 (1945). Certainly the additional instructions render any error of omission in the final mandate harmless beyond a reasonable doubt.

IV

On June 9, 1975, the United States Supreme Court decided *Mullaney v. Wilbur*, 421 U.S. 684, which held that a Maine jury instruction requiring a defendant being tried for murder to prove by a preponderance of the evidence, in order to reduce the murder to manslaughter, that he acted in the heat of passion on sudden provocation, violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution, as that clause was interpreted in *In re Winship*, 397 U.S. 358 (1970) to require the prosecution to prove beyond a reasonable doubt every fact necessary to constitute a crime. It was subsequently re-explained in *Faretta v. California*, 422 U.S. 806, n. 15 (1975) that the right of the defendant to have this burden placed on the State, though not literally expressed in any particular provision of the Constitution, was essential to due process of law in a fair adversary process.

Defendant contends that under the rationale of *Mullaney* the trial judge's instructions to the jury in this case violate Fourteenth Amendment Due Process. While the trial judge in defining second degree murder and manslaughter and in his final mandate to the jury placed upon the State the burden to prove beyond a reasonable doubt both malice and unlawful-

ness, i.e., without justification or excuse, he also instructed the jury, in pertinent part, as follows:

> *"If the State proves beyond a reasonable doubt or it is admitted that the defendant intentionally killed Gregory Ashe with a deadly weapon, or intentionally inflicted a wound upon Gregory Ashe with a deadly weapon, that proximately caused his death, the law raises two presumptions; first, that the killing was unlawful, and second, that it was done with malice. Then, nothing else appearing, the defendant would be guilty of second degree murder. . . .*
>
> "As I told you, you will have to either find the defendant guilty of second degree murder or manslaughter or not guilty. *In order to reduce the crime from second degree murder to manslaughter, the defendant must prove not beyond a reasonable doubt but simply to your satisfaction that there was no malice on his part. And in order to excuse his act altogether on the grounds of self-defense, the defendant must prove not beyond a reasonable doubt but simply to your satisfaction that he acted in self-defense.* And I will charge you on self-defense in just a moment. But I do want to charge you that *to negate malice and thereby reduce the crime to manslaughter, the defendant must satisfy you of three things:* first, that he shot Gregory Ashe in the heat of a passion. . . . The second thing he must satisfy you of is that this passion was provoked by acts of Gregory Ashe which the law regards as adequate provocation. . . . And thirdly, that the shooting took place so soon after the provocation that the passion of a person of average mind and disposition would not have cooled.
>
> *"To excuse the killing entirely on the grounds of self-defense . . . the defendant must satisfy you of four things:* first, that it appeared to the defendant and he believed it to be necessary to shoot Gregory Ashe in order to save himself from death or great bodily harm. . . . The second thing that you must be satisfied of—excuse me—that the defendant must satisfy you of is this, that the circumstances as they appeared to him at the time were sufficient to create such belief in the mind of a person of ordinary firmness. . . . And the third thing the defendant must satisfy you of is that he was not the aggressor. . . . And the fourth thing that the defendant must satisfy you of is that he did not use excessive force. . . .
>
> "If you find that the defendant acted properly in self-defense, he would not be guilty. However, if the defendant though otherwise acting in self-defense used excessive force, the defendant would be guilty of voluntary manslaughter." (Emphases supplied.)

[7] We hold that by reason of the decision in *Mullaney* the Due Process Clause of the Fourteenth Amendment prohibits the use of our long-standing rules in homicide cases that a defendant in order to rebut the presumption of malice must prove to the satisfaction of the jury that he killed in the heat of a sudden passion and to rebut the presumption of unlawfulness, that he killed in self-defense. The instructions given here insofar as they placed these burdens of proof on the defendant violate the concept of due process announced for the first time in *Mullaney*. We decline, however, for reasons hereinafter stated, to give *Mullaney* retroactive effect in North Carolina. We hold that because the trial judge instructed the jury in accordance with our law of homicide as it stood, and in a trial conducted, before the *Mullaney* decision, the defendant is not entitled to the benefit of the *Mullaney* doctrine. We will, however, apply the decision to all trials conducted on or after June 9, 1975.

The law of Maine and the precise issue it presented was succinctly stated by the Supreme Court in *Mullaney:*

> *"Absent justification or excuse, all intentional or criminally reckless killings are felonious homicides. Felonious homicide is punished as murder—i.e., by life imprisonment—unless the defendant proves by a fair preponderance of the evidence that it was committed in the heat of passion on sudden provocation,* in which case it is punished as manslaughter—i.e., by a fine not to exceed $1,000 or by imprisonment not to exceed 20 years. The issue is whether the Maine rule requiring the defendant to prove that he acted in the heat of passion on sudden provocation accords with due process." 421 U.S. at 691-92. (Emphasis supplied.)

A portion of the trial judge's instructions to the jury in Maine were summarized in *Mullaney* as follows:

> *"[T]hat if the prosecution established that the homicide was both intentional and unlawful, malice aforethought was to be conclusively implied unless the defendant proved by a fair preponderance of the evidence that he acted in*

the heat of passion on sudden provocation. The court emphasized that '*malice aforethought and heat of passion on sudden provocation are inconsistent things.*' [Appendix to the Record] at 62; thus, by proving the latter the defendant would negate the former and reduce the homicide from murder to manslaughter. The court then concluded its charge with elaborate definitions of 'heat of passion' and 'sudden provocation.'" *Id.* at 686-87. (Emphases supplied.)

Maine's conclusive implication of malice which arose from proof of an unlawful and intentional killing meant simply that upon proof of these things the defendant was guilty of murder unless the defendant proved by a fair preponderance of the evidence that he acted in heat of passion on sudden provocation where the issue of heat of passion was raised. Thus Maine's law under these circumstances relieved the State of the burden of proving both malice and the absence of heat of passion. In this the Supreme Court found that due process was wanting. It said:

> "Maine law requires a defendant to establish by a preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter. Under this burden of proof a defendant can be given a life sentence when the evidence indicates that it is *as likely as not* that he deserves a significantly lesser sentence. This is an intolerable result in a society where, to paraphrase Mr. Justice Harlan, it is far worse to sentence one guilty only of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter. *In re Winship*, 397 U.S. at 372 (concurring opinion). We therefore hold that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." *Id.* at 703-704.

In North Carolina, our law of homicide pertinent to the questions here raised has not been substantially changed since it was enunciated in 1864 in *State v. Ellick*, 60 N.C. 450. This Court there said:

> "When it is proved that one has killed intentionally, with a deadly weapon, the burthen of showing justification, excuse or mitigation, is upon him." *Id.* at 459.

* * * *

> ". . . the fact of the homicide must be proved *by the State;* but if found or admitted, the *onus* of showing justification, excuse or mitigation, is upon the *prisoner.*" *Id.* at 462.

The Court in *Ellick* concluded its opinion by saying that any fact which the State is required to establish must be proved beyond a reasonable doubt; but as to facts which the prisoner is required to establish, the jury must be satisfied by the testimony that they are true. *Ellick* has been cited as authoritative in *State v. Phillips*, 264 N.C. 508, 515, 142 S.E. 2d 337, 341 (1965) and *State v. Creech*, 229 N.C. 662, 673, 51 S.E. 2d 348, 357 (1949).

Another of our early cases on the subject was *State v. Willis*, 63 N.C. 26 (1868), which while holding that the defendant need not prove mitigation or justification by a preponderance of the evidence, nevertheless approved the following instruction given by the trial judge:

> "[W]hen it is proved or admitted that one killed another intentionally, with a deadly weapon, the burden of showing justification, excuse or mitigation is on him, and all the circumstances of such justification, excuse or mitigation are to be satisfactorily proved by him, unless they appear in the evidence against him; that the fact of killing being proved or admitted, nothing more appearing, the law presumes such killing to have been done in malice, and so to be murder; that the circumstances of justification, excuse or mitigation, are to be *satisfactorily* proved, not proved as the State is required to prove an essential fact, that is beyond a reasonable doubt, for the doctrine of reasonable doubt is never applied to the condemnation of a prisoner, but to his acquittal; and that the jury must be satisfied by the testimony offered in the case on either side that the matter in justification, excuse or mitigation is true." *Id.* at 26-27. (Emphasis supplied.)

The Court said further:

> "We prefer to stand *super antiquas vias*, and to adhere to the rules laid down in the *State v. Ellick*, above referred to. In that case the erroneous statement which we had inadvertently made in the *State v. Peter Johnson*, [48 N.C. 266 (1855)] that it was incumbent on the prisoner to establish the matters of excuse or extenuation beyond a

reasonable doubt, is corrected. In it is also corrected what we consider as erroneous in the decision of the Court in *Commonwealth v. York* [9 Met. (50 Mass.) 93 (1845)], that the matters of excuse or extenuation which the prisoner is to prove, must be decided according to the preponderance of evidence. It is more correct to say, as we think, that they must be proved to the satisfaction of the jury." *Id.* at 29.

In *State v. Vann*, 82 N.C. 631, 635 (1880), Justice Dillard, elucidating the law laid down in *Ellick* and *Willis*, wrote:

> "In an indictment for murder, the two constituents of the crime, to-wit, a voluntary killing and malice aforethought, must be proved by the state, as it makes the charge; and as the accused is presumed to be innocent until the contrary is shown, both of these elements must be proved. The killing being shown, then the other ingredient, malice prepense, is also proved as a fact in the eyes of the law, not by evidence adduced, but by a presumption that the law makes from the fact of the killing. And these two essential facts being thus established, the legal conclusion thereon is, that the offense charged is murder. (Citations omitted.)
>
> "But the implication of malice, made by the law and taken as a fact, is not conclusive on the party accused, but may be rebutted. He may show, if he can, by his proofs, that there was no malice prepense and thereby extenuate to manslaughter, or make a case of justifiable or excusable homicide, or a case of no criminality at all by proof of insanity at the time of the act committed, disabling him to know right from wrong. (Citations omitted.) *The burden lies on the accused to make these proofs, if he can; otherwise, the conclusion of murder, on a malice implied, will continue against him and will call for, and in law, oblige a conviction by the jury.*" (Emphasis supplied.)

In *State v. Miller*, 112 N.C. 878, 885, 17 S.E. 167, 169 (1893), the Court pointed out "that when the killing with a deadly weapon is proved and admitted the burden is shifted upon the prisoner, and he must satisfy the jury, if he can do so from the whole of the testimony, as well that offered for the State as for the defense, that matter relied on to show mitigation or excuse is true."

These early cases were decided before the enactment of N. C. Pub. Laws 1893, ch. 85 (now N. C. Gen. Stat. 14-17), which divided murder into two degrees. This act made certain specified kinds of murder, including a deliberate and premeditated killing, murder in the first degree. All other kinds of murder were made by the statute murder in the second degree. *State v. Benton*, 276 N.C. 641, 657, 174 S.E. 2d 793 (1970). Homicide cases decided subsequent to this statute continued to sanction the presumptions of unlawfulness and malice but refused to recognize any presumption of premeditation or deliberation. *State v. Brown*, 249 N.C. 271, 106 S.E. 2d 232 (1958); *State v. Absher*, 226 N.C. 656, 40 S.E. 2d 26 (1946); *State v. Keaton*, 206 N.C. 682, 175 S.E. 296 (1934); *State v. Rhyne*, 124 N.C. 847, 33 S.E. 128 (1899); *State v. Fuller*, 114 N.C. 885, 19 S.E. 797 (1894). Modern, accurate and sufficient statements of the rules regarding these presumptions may be found in *State v. DuBoise*, 279 N.C. 73, 181 S.E. 2d 393 (1971); *State v. Winford*, 279 N.C. 58, 181 S.E. 2d 423 (1971).

The foregoing authorities establish that from 1864 to 1975, 111 years, the law of this State has been this: when it is established by a defendant's judicial admission, or the State proves beyond a reasonable doubt that the defendant intentionally inflicted a wound upon the deceased with a deadly weapon which proximately caused death, the law raises two presumptions against the defendant: (1) the killing was unlawful, and (2) it was done with malice. Nothing else appearing in the case the defendant would be guilty of murder in the second degree. When these presumptions arise the burden devolves upon the defendant to prove to the satisfaction of the jury the legal provocation which will rob the crime of malice and reduce it to manslaughter or which will excuse the killing altogether on the ground of self-defense. If defendant rebuts the presumption of malice only, the presumption that the killing was unlawful remains, making the crime manslaughter. The jury instructions complained of here were in accordance with these long established rules.

This Court has never defined precisely what is meant by "satisfying" the jury. It has been clear, however, from the earliest cases that satisfying the jury meant something other than persuading beyond a reasonable doubt and persuading by a preponderance of the evidence. *State v. Freeman*, 275 N.C.

662, 170 S.E. 2d 461 (1969); *State v. Barrett*, 132 N.C. 1005, 43 S.E. 832 (1903). This Court said in *Barrett:*

> "[T]he prisoner must satisfy the jury, neither by a reasonable doubt nor yet by a preponderance of the evidence, but simply satisfy them, of the existence of facts and circumstances which mitigate the offense or which make good a plea of self-defense."

Satisfying the jury, the standard long adopted by this Court and utilized in the instructions now under consideration means, we believe, a standard no greater and at the same time one not significantly less than persuasion by a preponderance of the evidence. Satisfying the jury means that there must be some evidence offered of all elements of heat of passion on sudden provocation or of self-defense, as the case may be, and that this evidence must satisfy or persuade the jury of the truth of the existence of these provocations—one which robs the crime of malice and the other which excuses it altogether.

Under the Maine rules considered in *Mullaney* when the State proved beyond a reasonable doubt that the killing was (1) intentional, and (2) unlawful, the jury was told that the defendant would be guilty of murder unless he proved by a preponderance of the evidence that he killed in the heat of passion in which case he could be convicted only of manslaughter. Under North Carolina rules when the State proved beyond a reasonable doubt a killing proximately resulting from the intentional use of a deadly weapon the jury here was told, in effect, that defendant would be guilty of murder in the second degree unless he "satifies" the jury that he killed in the heat of sudden passion or in self-defense. The instructions here under consideration, therefore, like those in Maine, unconstitutionally relieved the prosecution of the burden of proving beyond a reasonable doubt malice and unlawfulness when the issues of their existence were properly raised.

We note that there is no evidence in this case of a killing in the heat of passion on sudden provocation. Therefore this issue is not "properly presented" as it was in *Mullaney*. There could not, consequently, be any *Mullaney* error prejudicial to defendant on this aspect of the case.

As a matter of state law, however, and as the jury was instructed here, our rules allocating burden of proof on self-defense and heat of passion are the same. As early as 1868 this

Court in *State v. Willis, supra* at 29-30 said, "In the proof of such matters we do not recognize any distinction between the case where the question is whether the homicide is murder or manslaughter, and that where it is whether the killing is murder or excusable or justifiable homicide." There is in this case evidence of self-defense. The issue regarding its existence is properly presented. For the guidance of our trial judges, consequently, and inasmuch as there are jury instructions given here as if there were evidence of a heat of passion killing, we have dicussed the matter as if such evidence were indeed present.

It is also true that the trial judge did near the beginning and at the end of his instructions tell the jury that the State had the burden to prove beyond a reasonable doubt both malice and unlawfulness. We are cognizant of the federal rule that jury instructions must be considered contextually in determining whether there is error of federal constitutional dimension. *Cupp v. Naughten*, 414 U.S. 141 (1973). Considering the entire instruction contextually we believe it must have meant this to the jury in this case: the state as a matter of abstract principle was required to prove each element of the offense charged, including malice and unlawfulness, beyond a reasonable doubt. If, however, an intentional killing with a deadly weapon was so proved (defendant here admitted this much) a presumption arises which even in the presence of evidence of a justifiable, and hence, lawful, homicide nevertheless relieves the state of proving unlawfulness and requires the jury to find the defendant guilty unless this evidence satisfies it of the truth of defendant's contention that he did kill in self-defense.

[8] The *Mullaney* ruling does not, however, preclude all use of our traditional presumptions of malice and unlawfulness. It precludes only utilizing them in such a way as to relieve the state of the burden of proof on these elements when the issue of their existence is raised by the evidence. The presumptions themselves, standing alone, are valid and, we believe, constitutional. *State v. Williams*, 288 N.C. 680, 220 S.E. 2d 558 (1975); *State v. Sparks*, 285 N.C. 631, 207 S.E. 2d 712 (1974), pet. for cert. filed, 43 U.S.L.W. 3392 (U.S. Nov. 29, 1974) (No. 669). Neither, by reason of *Mullaney*, is it unconstitutional to make the presumptions mandatory in the absence of contrary evidence nor to permit the logical inferences arising from facts proved (killing by intentional use of deadly weapon), *State v. Williams, supra*, to remain and be weighed against contrary evidence if

it is produced. The effect of making the presumptions mandatory in the absence of any contrary evidence is simply to impose upon the defendant a burden to go forward with or produce some evidence of all elements of self-defense or heat of passion on sudden provocation, or rely on such evidence as may be present in the State's case. The mandatory presumption is simply a way of stating our legal rule that in the absence of evidence of mitigating or justifying factors all killings accomplished through the intentional use of a deadly weapon are deemed to be malicious and unlawful. The prosecution need not prove malice and unlawfulness unless there is evidence in the case of their nonexistence. *Cf.* McCormick, Evidence § 346, n. 91 (2d Ed. 1972). We find this perceptive language in G. Fletcher, "Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion-Practices in Criminal Cases," 77 Yale L.J. 905 (1968) (cited in *Mullaney v. Wilbur, supra*, n. 16):

> "The critical step in the conceptual evolution of malice is *MacKally's Case*. [9 Co. Rep. 65b, 77 Eng. Rep. 828 (1611)]. That early 17th century decision, as reported and interpreted by Coke, stands for the principle that the prosecution need not prove the element of malice to convict of murder. The judges realized that malice does not lend itself to affirmative proof; by and large, the malicious killing is defined by reference to what it is not, not by what it is. As agreed by all, one type that was not malicious was a killing provoked by a sudden quarrel. Thus, to have a triable issue of malice, one had to have a triable claim that the defendant killed in the course of a sudden quarrel."

The same, we believe, may be said of the element of unlawfulness. There is no suggestion in *Mullaney* that placing such a burden of producing evidence upon a defendant violates Fourteenth Amendment Due Process. "Many States do require the defendant to show that there is 'some evidence' indicating that he acted in the heat of passion before requiring the prosecution to negate this element by proving the absence of passion beyond a reasonable doubt. (Citations omitted.) Nothing in this opinion is intended to affect that requirement." *Mullaney v. Wilbur, supra*, n. 28.

If there is evidence tending to show all elements of heat of passion on sudden provocation or self-defense the mandatory presumption of malice and unlawfulness, respectively, disappear but the logical inferences remaining from the facts proved

may be weighed against this evidence. In *United States v. Barnes*, 412 U.S. 837 (1973), the Supreme Court said:

> "Of course, the mere fact that there is some evidence tending to explain a defendant's possession consistent with innocence does not bar instructing the jury on the inference. The jury must weigh the explanation to determine whether it is 'satisfactory'. . . . The jury is not bound to accept or believe any particular explanation any more than it is bound to accept the correctness of the inference. But the burden of proving beyond a reasonable doubt that the defendant did have knowledge that the property was stolen, an essential element of the crime, remains on the government."

See United States v. Dube, 520 F. 2d 250 (1st Cir. 1975) (Judge Campbell concurring.)

Mullaney, then, as we have interpreted it, requires our trial judges in homicide cases to follow these principles in their jury instructions: the State must bear the burden throughout the trial of proving each element of the crime charged including, where applicable, malice and unlawfulness beyond a reasonable doubt. The decision permits the state to rely on mandatory presumptions of malice and unlawfulness upon proof beyond a reasonable doubt that the defendant intentionally inflicted a wound upon the deceased with a deadly weapon which proximately resulted in death. If, after the mandatory presumptions are raised, there is no evidence of a heat of passion killing on sudden provocation and no evidence that the killing was in self-defense, *Mullaney* permits and our law requires the jury to be instructed that defendant must be convicted of murder in the second degree. If, on the other hand, there is evidence in the case of all the elements of heat of passion on sudden provocation the mandatory presumption of malice disappears but the logical inferences from the facts proved remain in the case to be weighed against this evidence. If upon considering all the evidence, including the inferences and the evidence of heat of passion, the jury is left with a reasonable doubt as to the existence of malice it must find the defendant not guilty of murder in the second degree and should then consider whether he is guilty of manslaughter. If there is evidence in the case of all the elements of self-defense, the mandatory presumption of unlawfulness disappears but the logical inferences from the facts proved may be weighed against this evidence. If upon

considering all the evidence, including the inferences and evidence of self-defense, the jury is left with a reasonable doubt as to the existence of unlawfulness it must find the defendant not guilty.

V

This case was tried November 21, 1974; *Mullaney* was decided June 9, 1975. We decline, without further guidance from the Supreme Court, to give the decision retroactive effect. We believe and hope that the Supreme Court will eventually determine that the decision applies prospectively only. If such a determination is eventually made by the Supreme Court not only would we not be required to apply its principles to the case now before us, *Kaiser v. New York*, 394 U.S. 280 (1969); *Desist v. United States*, 394 U.S. 244 (1969), it seems that it would be considered error by the Supreme Court for us to do so. In *Michigan v. Payne*, 412 U.S. 47 (1973), the Michigan Supreme Court had rejected a higher sentence imposed upon a defendant convicted after a retrial than was imposed upon his first conviction as being violative of certain due process requirements established in *North Carolina v. Pearce*, 395 U.S. 711 (1969). The second sentence was imposed before the *Pearce* decision. In *Payne* the United States Supreme Court held that *Pearce* would not apply retroactively and it was, consequently, error for the Michigan Supreme Court to apply it to a sentencing proceeding which predated the decision although the question of the constitutionality of the higher sentence was pending before the Michigan Supreme Court when *Pearce* was decided. The judgment of the Michigan Supreme Court was reversed and the case remanded for further proceedings. *See also State v. Bullock*, 268 N.C. 560, 151 S.E. 2d 9 (1966) and *State v. Mills*, 268 N.C. 142, 150 S.E. 2d 13 (1966) where we declined to apply *Miranda v. Arizona*, 384 U.S. 436 (1966) to cases in which the trials were conducted before the decision but which were pending on appeal at the time the decision came down, on the authority of *Johnson v. New Jersey*, 384 U.S. 719 (1966).

While *Mullaney* relied heavily on *Winship* and *Winship* was held to be retroactive in *Ivan V. v. City of New York*, 407 U.S. 203 (1972), it does not necessarily follow that *Mullaney* will be given retroactive effect.

In determining whether a new rule of constitutional proportions is given retroactive effect the Supreme Court seems

to have considered three factors. The most important factor seems to have been the purpose to be served by the new rule. If the rule is designed to protect the reliability of the fact finding process and "the constitutional error presents a serious risk that the issue of guilt or innocence may not have been reliably determined" then it has been said that the decision will on this basis alone be given full retroactive effect. *Ivan V. v. City of New York, supra* (holding *In re Winship, supra*, retroactive); *Roberts v. Russell*, 392 U.S. 293 (1968) (holding *Bruton v. United States*, 391 U.S. 123 (1968) retroactive).

If the first factor is not determinative then the Supreme Court has considered two other factors: the extent of reliance on previous decisions, *Tehan v. United States ex rel. Shott*, 382 U.S. 406 (1966), even though the new rule may have been "foreshadowed" by intervening cases, *Desist v. United States, supra* at 248, and the effect on the administration of justice of retroactive application, *Id.* at 251, not only in the nation as a whole but within the particular jurisdictions affected. *Tehan v. United States ex rel. Shott, supra* at 418-419.

Although the first factor listed is clearly the most important, how that factor is approached by the Supreme Court seems sometimes to depend on analysis of the other two factors. *Compare Tehan v. United States ex rel. Shott, supra* (holding *Griffin v. California*, 380 U.S. 609 (1965) not retroactive), *with Stovall v. Denno*, 388 U.S. 293 (1967) (holding *United States v. Wade*, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967) not retroactive). In holding *Griffin*, which declared unconstitutional the California practice of commenting on a defendant's failure to take the stand, not to be retroactive the Supreme Court in *Tehan* recognized that, although only six states would be affected by *Griffin*, almost every trial in those six states going back many years might have to be upset if *Griffin* were made retroactive. Noting such a devastating impact on the administration of justice, the Supreme Court said:

> "Those reaping the greatest benefit from a rule compelling retroactive application of *Griffin* would be [those] under lengthy sentences imposed many years before *Griffin*. Their cases would offer the least likelihood of a successful retrial since in many, if not most, instances, witnesses and evidence are no longer available." *Tehan v. United States ex rel. Shott, supra* at 418-419.

Mullaney and *Winship* are poles apart in terms of extent of reliance on previous rules and the effect on the administration of justice of retroactive application. It seems clear that the Supreme Court saw no reliance by New York on previous rules in *Winship*. It traced almost 100 years of cases in which it had "assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required." *In re Winship, supra* at 362. It considered *In re Gault*, 387 U.S. 1 (1967) as an express rejection of the notion that the Due Process Clause was inapplicable to juvenile proceedings. *In re Winship, supra* at 365. *Winship*, furthermore, involved a juvenile proceeding. Its impact, consequently, on the administration of justice in New York would obviously be less than a rule which applies to all homicide cases.

The jury instructions here under attack are based upon rules which have been firmly with us for over one hundred years. Retroactive application of *Mullaney* in this State would, furthermore, have the same sort of affect, recognized in *Tehan*, as *Griffin* retroactivity would have had in California and other jurisdictions. As of June 30, 1975, there were 269 inmates in prison in this State who had been convicted of first degree murder serving sentences of life imprisonment or awaiting execution, and 728 inmates in prison having been convicted of second degree murder serving sentences ranging from two years to life. State Correctional Statistical Abstract for the Second Quarter, 1975. If *Mullaney* is to be applied retroactively new trials might have to be awarded in many cases decades old.

A number of other jurisdictions would, we believe, be similarly affected. In the following seven jurisdictions the defendant has (or had) the burden to prove by a preponderance of the evidence heat of passion on sudden provocation (or "extreme emotional distress") to reduce murder to manslaughter: *Delaware, Fuentes v. State*, 18 Crim. Law Rptr. 2153 (Del. Oct. 14, 1975); *Hawaii, (Mullaney* would probably affect cases in which the appeal was finally determined prior to August 27, 1971. *Compare State v. Santiago*, 53 Haw. 254, 492 P. 2d 657 (1971) *with State v. Cuevas*, 53 Haw. 110, 488 P. 2d 322 (1971)); *Maine, Mullaney v. Wilbur, supra; Maryland, Wilson v. State*, 261 Md. 551, 276 A. 2d 214 (1971); *Wilson v. State*, 28 Md. App. 168, 343 A. 2d 537 (1975); *Burko v. State*, 19 Md. App. 645, 313 A. 2d 864 (1974) vacated 422 U.S. 1003, 95 S.Ct. 2624 (1975); *Massachusetts, Comm. v. Johnson*, ... Mass. App. ..., 326 N.E. 2d 355 (1975) restating the rule of *Comm. v. York*, 50 Mass. (9 Met.) 93 (1845); *Cf. Comm. v. Gagne*, ... Mass. ..., 326 N.E. 2d 907, 910 (1975); *New York, People v. Balogun*, 372 N.Y.S. 2d 384 (N. Y. Supreme Ct. Kings County 1975); *Tennessee, Hawkins v. State*, 527 S.W. 2d 157 (Tenn. App. 1975). If, as we believe, *Mullaney* prohibits requiring the defendant to prove that he acted in self-defense by a preponderance of the evidence when that issue is properly presented the following seven jurisdictions would be adversely affected: *Georgia, Chandle v. State*, 230 Ga. 574, 198 S.E. 2d 289 (1973); *See also Henderson v. State*, ... Ga. ..., 218 S.E. 2d 612 (1975) (citing *Mullaney); Ohio, State v. Poole*, 33 Ohio St. 2d 18, 294 N.E. 2d 888 (1973) (for cases prior to January 1, 1974, the effective date of Ohio Rev. Code Ann. § 2901.05 (Page 1975) which probably corrects Ohio law); *Pennsylvania, Comm. v. Cropper*, ... Pa. ..., 345 A. 2d 645 (1975) (intimating that *Mullaney* may affect Pennsylvania); *Comm. v. Carbonetto*, 455 Pa. 93, 314 A. 2d 304 (1974); *Comm. v. Winebrenner*, 439 Pa. 73, 265 A. 2d 108 (1970); *Rhode Island, State v. Mellow*, 107 A. 871 (1919); *South Carolina, State v. Judge*, 208 S.C. 497, 38 S.E. 2d 715 (1946); *Texas, Parkman v. State*, 149 Tex. Cr. 101, 191 S.W. 2d 743 (1945) (at least in cases tried before January 1, 1974, the effective date of the new Texas Penal Code §§ 2.03, 9.02, 9.31 (Vernon 1974), which probably corrects Texas law in this respect); *West Virginia, State v. Collins*, 154 W. Va. 771, 180 S.E. 2d 54 (1971).

Retroactive application of *Mullaney* requiring retrials in homicide cases years old in at least fifteen jurisdictions would, we believe, have on the administration of justice in this country a devastating impact.

We concede that the purpose of the *Mullaney* rule, to insure a reliable determination of the question of guilt, or the degree of guilt, weighs in favor of retroactivity. Yet the Supreme Court has recognized that "the extent to which a condemned practice infects the integrity of the truth-determining process at trial is a question of probabilities." *Williams v. United States*, 401 U.S. 646, n. 7 (1971); *Stovall v. Denno, supra*. While in *Winship* there could be no question that the standard of proof employed was determinative on the issue of guilt, *In re Winship, supra*, n. 2, whether the jury instructions condemned in *Mullaney* and even more clearly those under attack here would in the final analysis be so determinative to a jury so instructed is a matter of pure speculation.

We note that both cases from other jurisdictions which have so far considered the question, have determined that *Mullaney* should not be given retroactive effect. *Fuentes v. State, supra* (Delaware); *People v. Balogun, supra* (New York).

For the reasons given, in the trial we find

No error.

Justice LAKE concurring in result.

It is elementary that a decision of the Supreme Court of the United States interpreting the Constitution of the United States is binding upon this Court and, although we may believe it to be erroneous, we must give it full effect in cases coming before us. It is equally elementary that a decision of a court of last resort, declaring or interpreting a rule of law, is retroactive and applies to all cases thereafter to be decided, irrespective of when they arose, unless the court which rendered that decision declares otherwise. This is more clearly true when there has been no prior conflicting decision by that court. This Court does not have authority to declare a decision of the Supreme Court of the United States non-retroactive. In the silence of that Court on that question a decision by it, interpreting the Due Process Clause of the Fourteenth Amendment, gives to that clause the meaning so declared just as if the interpretation had been expressly written into it at the time the Amendment was ratified.

To hold, as the majority opinion does, that *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. , 44 L.Ed. 2d 508, declares that the instruction given the jury in the case now before us, violates the Due Process Clause of the Fourteenth Amendment, but that we will, nevertheless, refuse to order a new trial is for this Court to deny to this defendant his right under the United States Constitution. I agree that to give *Mullaney v. Wilbur, supra*, retroactive effect and to hold that it declares the instruction in question is contrary to the Due Process Clause of the Fourteenth Amendment would be disastrous, for such ruling would require a new trial, not only for this defendant, but for an unknown number, perhaps hundreds, of prisoners now serving sentences for murders of which this Court has held they were lawfully convicted. The practical effect would be to release most of these convicted murders upon society, since loss of witnesses, due to the passage of time, would, in most instances, prevent conviction upon a retrial. This disaster can be averted if the Supreme Court of the United States declares *Mullaney v. Wilbur, supra*, to be non-retroactive, a consummation devoutly to be desired, but this Court has no authority so to declare and, as of this date, the Supreme Court of the United States has not done so.

There is a way, however, whereby this Court can avoid this disastrous result and, in my opinion, should do so. That is to hold, as I believe is correct, that *Mullaney v. Wilbur, supra*, does not declare the instruction given to the jury by the Superior Court in Hankerson's case a violation of the Due Process Clause. If that be true, Hankerson is not entitled to a new trial and the majority opinion has reached the correct result for the wrong reason.

This is the instruction in question:

"Under our system, when a person is charged with a crime and he pleads not guilty he does not have to prove that he is innocent, he is presumed innocent, and the *burden of proof is on the State to prove beyond a reasonable doubt that he is guilty* before you can find him guilty.

* * *

"I charge that for you to find the defendant guilty of second degree murder [the crime with which Hankerson was charged and of which he stands convicted], *the State must prove two things beyond a reasonable doubt* * * * that the defendant intentionally *and without justification* or excuse and *with malice* shot Gregory Ashe with a deadly weapon. *Malice* * * * *means that condition of mind which prompts a person* to take the life of another intentionally, *or to intentionally inflict a wound with a deadly weapon upon another which proximately results in his death without just cause, excuse or justification.*

* * *

"In order to reduce the crime from second degree murder to manslaughter, *the defendant must prove* not beyond a reasonable doubt but *simply to your satisfaction* that there was no malice on his part. And in order to excuse his act altogether on the grounds of self defense, *the defendant must prove* not beyond a reasonable doubt but *simply to your satisfaction* that he acted in self defense.

* * *

"So I charge you, Ladies and Gentlemen, *if you find* from the evidence and *beyond a reasonable doubt* that on or about September 29, 1974, *the defendant*, Johnnie B. Hankerson, *intentionally and with malice* and *without justification or excuse* [i.e., not in self defense] shot Gregory Ashe with a deadly weapon, thereby proximately causing Gregory Ashe's death, nothing else appearing, it would be your duty to return a verdict of guilty of second degree murder. *However, if you* do not so find, or *have a reasonable doubt as to one or more of these things*, you will not return a verdict of guilty of second degree murder." (Emphasis added.)

By this instruction the trial judge put squarely upon the State the burden to prove *beyond a reasonable doubt* every element of second degree murder, namely: (1) The defendant shot Ashe; (2) he thereby proximately caused Ashe's death; (3) he shot Ashe with malice (i.e., intentionally and with a deadly weapon); (4) he shot Ashe without justification or excuse (i.e., not in self defense).

Clearly, if this were all that the jury was told, the rule of *Mullaney v. Wilbur, supra*, would be fully satisfied. But, says the majority, this is not all they were told. They were also told that to reduce the offense to manslaughter the defendant must prove *to the jury's satisfaction* he did not shoot Ashe with malice, and to excuse the killing entirely on the ground of self defense, the defendant must prove *to the jury's satisfaction* that he killed Ashe in self defense, the elements of which were correctly defined.

At first glance it seems inconsistent and contradictory to instruct the jury that the State has the burden to prove beyond a reasonable doubt the presence of malice and absence of the justification of self defense and the defendant has the burden of proving *to the satisfaction of the jury* the absence of malice or the presence of the justification of self defense. This Court has, however, held to the contrary many times, the harmonizing factor lying in the meaning of the term "to the satisfaction of the jury."

In *State v. Freeman*, 275 N.C. 662, 666, 170 S.E. 2d 461, Justice Sharp, now Chief Justice, speaking for a unanimous Court, said:

"These cases [citations omitted] enunciate and reiterate the rule—established in our law for over one hundred years, *State v. Willis*, 63 N.C. 26 (1868)—that when the burden rests upon an accused to establish an affirmative defense or to rebut the presumption of malice which the evidence has raised against him, the *quantum* of proof is to the satisfaction of the jury—not by the greater weight of the evidence nor beyond a reasonable doubt—*but simply to the satisfaction of the jury.*"

In Stansbury, North Carolina Evidence (Brandis Revision), § 214, it is said that proving the presence of self defense or the absence of malice "to the satisfaction of the jury" does not require a showing "by the greater weight of the evidence."

If the defendant can satisfy this requirement by less than the "greater weight" of the evidence; that is by less persuasive, less convincing evidence than would be sufficient to tip the scales ever so slightly in his favor, how can it be said that the burden *of proof* "has been put upon him?" The burden of proof is the *burden* to persuade the mind, to convince. A burden less than this can only be a burden to establish a reasonable, rational doubt. Thus, there is no inconsistency in telling the jury that, to convict the defendant of second degree murder, the State must prove presence of malice and absence of justification (self defense) beyond a reasonable doubt and, although the State has proved, beyond a reasonable doubt, an intentional killing with a deadly weapon, the defendant must be acquitted of that charge if he has *satisfied* the jury of the absence of malice or the presence of justification (self defense).

Admittedly, the jury cannot be expected to know what this Court has said proof "to the satisfaction of the jury" does not mean. The question is whether the jury could have been misled by what the trial judge told them in his charge *in this case*. As above stated, he clearly and unequivocally told the jury they must find the defendant not guilty of second degree murder unless the State had proved *beyond a reasonable doubt* every element of that crime, including the presence of malice and the absence of justification (self defense). In my opinion, the jury which found this defendant guilty of second degree

murder could not have been confused about this, and the charge of the court, which is a correct statement of the law of this State, did not in any way place upon the defendant a burden of proof forbidden by the Due Process Clause of the Fourteenth Amendment as now construed in *Mullaney v. Wilbur, supra*. I, therefore, concur in the majority's conclusion that this defendant is not entitled to a new trial.

STATE OF NORTH CAROLINA v. ROGER DALE CURRY, JOSEPH MICHAEL GUNTER, ALBERT WILLIAM JOHNSON, RONALD ALLEN JOHNSON, LOWELL GENE BOWLES, JAMES OLIVER STEVENS

No. 37

(Filed 17 December 1975)

1. **Burglary and Unlawful Breakings § 5; Robbery § 4— first degree burglary — robbery with firearm — sufficiency of evidence**

Defendants' motions to dismiss the charges of first degree burglary and robbery with a firearm were properly denied where the evidence tended to show that the victim was awakened during the night by the growling of his dog, he observed a man shining a flashlight into his window, the man entered the house and told the victim to call his dog and come outside to talk, the victim refused and armed himself with a pistol, the intruder left the house, the victim observed eight armed men standing in his yard, three entered the house and began firing at the victim who returned their fire, the three men left and fired into the house from outside, one of the men told the victim to throw his gun down or they would burn the house, the victim complied, the eight men beat him, and the eight then went through the victim's house emptying drawers and boxes, smashing furniture, and taking various items belonging to the victim, and the victim identified the six defendants as participants in the crime.

2. **Searches and Seizures § 1— search of shed cellar — standing of defendants to object**

Defendants had no standing to object to the admission into evidence of weapons and articles found in the cellar of a shed in the vicinity of the crime, since the shed was not occupied by anyone at the time of the discovery and seizure of the articles and was not on or a part of the premises occupied by defendants, none of the defendants was then in or about the shed, and no defendant asserted any ownership or possessory interest therein; furthermore, a photograph of the articles seized and the articles themselves were admissible in evidence since they were seized during a lawful, though warrantless, search of the shed by officers who had probable cause to believe that two of the defendants were probably concealed in the vicinity.

3. **Criminal Law § 84; Searches and Seizures § 1— weapons in plain view — seizure without warrant — admissibility**

Where defendants failed to object at the time they were offered into evidence to the admission of weapons removed by officers from one defendant's house, they cannot assert on appeal that the weapons were the fruit of unreasonable search and seizure; moreover, evidence tended to show that the officers were lawfully in the house, having reason to believe that two other defendants for whom the officers had arrest warrants might be therein, and the evidence tended to show that the weapons seized were in plain view in the house.

4. **Burglary and Unlawful Breakings § 4; Robbery § 3— victim's description of assailants — competency**

The trial court in a prosecution for first degree burglary and robbery with a firearm did not err in allowing the victim, over objection, to describe the appearance of and clothing worn by his assailants or in admitting into evidence a shirt and jacket worn by one defendant when he was arrested.

5. **Criminal Law § 86— cross-examination of defendant — prior convictions or acts of misconduct**

A defendant in a criminal case who takes the witness stand may not be asked on cross-examination as to whether he has been accused, indicted or arrested for an unrelated criminal offense, but he may be asked whether he has been convicted of or has committed such criminal acts or other specific acts of reprehensible conduct, provided the question is asked in good faith; therefore, it was not error for the trial court to permit the State to cross-examine defendants charged with first degree burglary and robbery with a firearm with reference to other acts of misconduct.

6. **Criminal Law § 77— defendant held at gun point — statement competent as admission**

In a prosecution for first degree burglary and robbery with a firearm where the evidence tended to show that the victim's stepfather, not a police officer, held one defendant at gun point while the victim went to call police and the stepfather asked defendant who had been with him, defendant's response, "I'll take you to the rest of them if you will let me go," was competent as an admission against that defendant.

7. **Criminal Law § 58— handwriting expert — refusal to give opinion — other testimony admissible**

Although an expert handwriting witness was unable to form an opinion satisfactory to himself as to whether one defendant had or had not signed the document in question because it was the witness's opinion that the photostatic copy of the document offered him did not show clearly certain characteristics of the handwriting, it was not error for the court to allow the witness to point out certain observable differences between the photostatic copy of the document and a known sample of the defendant's handwriting.

Supreme Court, U. S.
FILED
NOV 17 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-6568

JOHNNIE B. HANKERSON, PETITIONER,

v.

STATE OF NORTH CAROLINA, RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

PETITION FOR CERTIORARI FILED APRIL 12, 1976
CERTIORARI GRANTED OCTOBER 4, 1976

In the Supreme Court of the United States

OCTOBER TERM, 1976
No. 75-6568

JOHNNIE B. HANKERSON, PETITIONER,
v.
STATE OF NORTH CAROLINA, RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

224-112—76——1

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1

DOCKET ENTRIES

1. District Court of Nash County, North Carolina, September 29, 1974, Warrant for Arrest of Petitioner charging him with the unlawful, willful, and felonious murder of Gregory Eugene Ashe with malice aforethought on the 29th day of September, 1974.
2. Superior Court of Nash County, North Carolina—On November 20, 1974 Petitioner and his attorney W. O. Rosser waived the finding and returning into Court of a bill of indictment and agreed that the case be tried upon information alleging that on or about the 29th day of September, 1974 in Nash County, Johnnie B. Hankerson unlawfully and willfully did feloniousy and with malice by the use of a deadly weapon, to wit a pistol, kill and murder Gregory Eugene Ashe contrary to the form of the Statute in such case made and provided and against the peace and dignity of the State.
3. Superior Court of Nash County, North Carolina—At the November 11, 1975, Session, upon his plea of not guilty, Petitioner was tried and convicted of Second Degree Murder. In the same Court on the 21st day of November, 1974 Presiding Judge John Webb ordered the Petitioner imprisoned for the term of not less than twenty nor more than twenty-five years in the State's Prison.
4. Superior Court of Nash County, North Carolina—In apt time, Petitioner objected and excepted to the rulings and Judgment of the trial court and gave Notice of Appeal to the North Carolina Court of Appeals with further notice being waived on November 21, 1974.
5. Superior Court of Nash County, North Carolina—Order of Assignment of Counsel, W. O. Rosser and L. G. Diedrick to appeal Petitioner's case to the appellate courts of North Carolina, November 21, 1974.

2 6. North Carolina Court of Appeals, May 29, 1975—Oral argument on Petitioner's appeal.

7. North Carolina Court of Appeals. July 16, 1975—Decision upholding the Judgment of the trial court, *Arnold, J.*, dissenting; decision certified July 28, 1975, reported in 26 NC App. 575, 217 S. E. 2d 9 (1975).
8. Supreme Court of North Carolina, July 31, 1975—Petitioner filed Notice of Appeal from the North Carolina Court of Appeals to the Supreme Court of North Carolina as a matter of right pursuant to North Carolina General Statute 7A–30 (2).
9. Supreme Court of North Carolina, August 19, 1975—Petitioner filed Motion to Amend the record to note additional Exceptions and Assignments of Error which would raise for review additional questions suggested by this Court in *Mullaney* vs. *Wilbur*, 421 US 684 (1975), decided June 9, 1975.
10. Supreme Court of North Carolina, September 2, 1975—Petitioner's Motion to Amend the Record to note additional Exceptions and Assignments of Error allowed.
11. Supreme Court of North Carolina, September 10, 1975—Oral argument on Petitioner's appeal.
12. Supreme Court of North Carolina, December 17, 1975—Decision filed denying Petitioner's appeal, reported in 288 NC 632 (1975).
13. Supreme Court of the United States—Petitioner's Application for an Extension of Time In Which to File Petition for Writ of Certiorari allowed extending said time to April 15, 1976 by Order of Chief Justice Burger, dated March 12, 1976.
14. Supreme Court of the United States, April 12, 1976, Petition for Writ of Certiorari docketed.
15. Supreme Court of the United States, October 4, 1976—Petitioner's Motion For Leave to Proceed In Forma Pauperis and Petition for Writ of Certiorari granted.

STATE OF NORTH CAROLINA v. JOHNNIE B. HANKERSON

Charge to the Jury

[Printed in the Case and Record on Appeal in the Supreme Court of North Carolina beginning at Page 52]

Ladies and Gentlemen, you have now heard all the evidence in the case and the arguments of the lawyers, and it is now my duty to charge you as to the law that arises on the evidence, at the end of which time I will let you retire and render your verdict.

This is a criminal action in which the defendant, Johnnie B. Hankerson, has been charged on an Information that he did commit second degree murder against Gregory Ashe. To this charge the defendant has pled not guilty, and the fact that he has been charged is no evidence that he is guilty. Under our system, when a person is charged with a crime and he pleads not guilty he does not have to prove that he is innocent, he is presumed to be innocent, and the burden of proof is on the State to prove beyond a reasonable doubt that he is guilty before you can find him guilty.

When I speak of a reasonable doubt I don't mean a vain, a fanciful or an imaginary doubt, but I do mean a sane or a rational doubt. If, after a consideration of all the evidence, you are fully satisfied or entirely convinced to a moral certainty that the defendant is guilty, then you would be satisfied beyond a reasonable doubt. On the other hand, if you have any doubt based on reason and common sense, arising out of some or all the evidence that has been presented, or lack of evidence as the case may be, as to any fact necessary to constitute the guilt of the defendant, then you would have a reasonable doubt, and it would be your duty to give the defendant the benefit of that doubt and find him not guilty.

I am going to recount for you some of the evidence that has been presented in the case but in doing so I want to instruct you

I am not trying to tell you what the evidence is or how I think you should find the facts from the evidence. Indeed, I have no opinion as to whether you should find the defendant guilty or not guilty in this case. And if your recollection of the evidence differs from my recollection, it would be your duty to reject my recollection and use your own recollection, because you are the sole triers of fact in this case. My sole purpose in recounting some of the evidence for you is so that I can apply the law that arises on the evidence.

In this case the State has introduced first of all in the form of testimony by Lorenzo Donald Dancy, who testified that he is sometimes called "Low," that he is 18 years old and knew Gregory Ashe, that he was a close friend of his. He testified that on September 29, 1974 he was with Gregory Ashe, that he had met him that night at a place is Whitakers, North Carolina, called Bandy's Place; that he met him there sometime around 10:30 or 11:00 o'clock P.M., and that Bandy's was mostly a dance hall, and that "Greg," as he called the deceased was with Wilbert Whitley and that they stayed there at Bandy's about 25 minutes; that he does not know Johnnie Hankerson and did not see him that night; that he does know that Johnnie Hankerson drives a black and yellow Plymouth automobile. That he, Wilbert and Greg Ashe left Bandy's in Greg's automobile, that they were going to a club and stopped by a poolroom on the way, that they got out of the car, the poolroom was locked and they couldn't get in, and that they went back to Greg's car and Gregory Ashe couldn't get the car started, so all of three of them got out and started down a path and he was on his way home; that Greg Ashe was walking with them and then he, Gregory Ashe, turned and went back to his car, and they walked a little way and then when they hadn't walked very far Wilbert was in front of him and he heard a shot and that he heard Gregory Ashe holler that he had been shot. That he then ran back to where he heard the shot from and he saw a yellow and black Plymouth Satellite pull off, that it went through an intersection at a fast rate of speed and drove out to Highway 301 and turned on the highway and left. That he ran to Alfonse Bellamy's girl friend's house and that he went inside; that first of all he called Wilbert's home from Alfonse Bellamy's girl friend's house but he didn't answer so then he went to the store and found Wilbert and then they went back to look for Greg; that at first they couldn't find

him but then they found him lying in a field flat on his face, that some man who was there with them felt him to see if he was still alive, and that about that time Gregory's mother arrived and the police arrived, and that when they found Gregory Ashe's body he had a cigarette in his hand that had been lit, and that Gregory Ashe's mother took the cigarette. He testified that he had never seen Gregory Ashe with a knife like the one introduced in evidence as one of the exhibits in this case. That he did hear Gregory Ashe ask for a light just before he left him that night and no one had a light, and that when they found his body the cigarette had been lighted but it had gone out.

The State then introduced evidence in the form of testimony by Wilbert Whitley, who testified that he is 24 years old, that he lives in Witakers, North Carolina, that he knew Gregory Ashe before Gregory Ashe died; that he had never seen Gregory Ashe with a knife like the one introduced in evidence; that he got up with Gregory Ashe that night at his own home, that is, at Wilbert Whitley's home, and they went to the "Cut" and the first place they went was to Robert Earl Bandy's in the "Cut," which is part of Whitakers, North Carolina; that Wilbert Whitley had not had anything to drink that night and he could not tell if Gregory Ashe had; that they left Bandy's Place and went to a poolroom; that he saw the defendant that night at the "Cut"; that when they left Bandy's that Lorenzo Dancy went with them, that they first of all went to a poolroom which was closed and when they cut the car off Greg couldn't get the car started when they started to leave the poolroom and that Wilbert Whitley told them that he was going on home and that he walked on across the intersection and while he was walking towards the intersection he saw a car light coming from behind him and that there was nothing unusual about it, that he heard a gun go off, that he turned and looked back and a yellow and black automobile was taking off and cutting the corner and went out onto 301 and drove off, and that it was a yellow and black Satellite, and that he heard Lorenzo Dancy yell that Greg said he was shot; that he ran back but they couldn't find Greg; that they then went to Evans Store and got some help and then they went back and Lorenzo Dancy came up with Alfonse Bellamy and that they found the body after hunting for it for about half an hour; that he stayed there until about 4:00 A.M. himself. That earlier that night Gregory Ashe had asked for a match but no one had

one; that Gregory Ashe had a cigarette when they did find his body and the cigarette had been lit.

The State then introduced evidence in the form of testimony by Alfonse William Bellamy, who testified that he lives in the "Cut" in Whitakers, North Carolina, and that he knew Gregory Ashe like a brother, that he had known him for about one year, and he knew Gregory Ashe would never carry a knife like the one introduced into evidence because it slips from the hand too easily. That on the night of September 29, 1974, "Low" came and told him that Greg had been shot, and that he went to the place where he said he had been shot and that he got in Greg's car, that he knew how to start it, and after he was able to start it he turned around and after some searching they turned the lights into a certain direction and Gregory Ashe's body was under the headlights; that Gregory Ashe was lying on his face, or the body of Gregory Ashe was, and that when they turned him over that he had a cigarette in his hand; that everyone including Gregory Ashe's mother arrived at about the same time.

The State then introduced evidence in the form of testimony by Etheline Lyons, who testified that she was the mother of Gregory Ashe and she lives in Bloomer Hill in Whitakers, North Carolina; that at about 11:00 o'clock P.M. that night she heard Gregory Ashe talking and then she heard his automobile start, and that about 30 minutes later someone knocked on the door and told her that her son had been shot; that she went out looking for him and after looking for him for a while they found his body on Bloomer Hill lying facedown, and when they turned him over he had a cigarette in his hand.

The State then introduced evidence in the form of testimony by M. M. Reams, who testified that he is a deputy sheriff with
the Nash County Sheriff's Department; that he received
7 a radio message at about 12:05 A.M. on September 29,
1974; that he went to Bloomer Hill in Whitakers, North Carolina, that night and when he arrived there he saw the body of Gregory Ashe and he was lying facedown; that at about that time he received a call and he left the scene and went to Battleboro and met a State Trooper and Lorenzo Dancy; that after taking a statement from Dancy he checked on the registration of the Satellite Plymouth and it belonged to the defendant; that he then drove to the defendant's home, he advised him of his rights, and the defendant told him that he had shot at a

person but he didn't know whether he had hit him or not, and he said that Mr. Hankerson told him that this person he had shot at had grabbed him and tried to cut his throat; that he did observe some blood on the automobile on the driver's side. Mr. Reams testified that after searching the car he found a knife in the car that had some wood on it, and that the defendant showed him a greasy spot on his sweater where he said a boy had grabbed him; that Mr. Hankerson told him that he was in the process of buying the gun that he had used and that he had returned it to the person he was buying it from, and that was the only statement he made to him about the gun; that he then brought the defendant to Nashville and placed him in the Nash County Jail and went back to the scene in Whitakers where they had found the body and continued his investigation. Mr. Reams testified on cross-examination that Johnnie Hankerson had told him that someone had tried to rob him, that he was in his automobile that night and that someone had asked for a light and he stopped the car and reached over and pushed the cigarette lighter in and then handed the cigarette lighter to the person who had asked for it, and when he put the cigarette lighter back that the man had a knife at his throat and that he had a gun on the seat beside him and he picked up the gun and fired and didn't know whether he had hit him or not.

That is some of the evidence for the State in the case. The defendant has introduced evidence. He, first of all testified in his own behalf, and he testified that his name is Johnnie Hankerson, that he lives in Battleboro, North Carolina, that he is 53 years old, that he now works for Koppers Lumber Company, and that he worked for 11 years when he first came to Whitakers from Elizabeth City for Stinson Lumber Company, then he
went to Tennessee for six months, then he came back to
8 Battleboro and has worked there since that time, or has
worked in North Carolina since that time. The he was in Whitakers on the night of September 29, 1974; that he went there by himself, that he first went to Bandy's, left there and then he went to the trailer of "Big Mama" and that he stayed there for about five minutes, that he left "Big Mama's" trailer and he started driving back towards Highway 301; that there were some water holes in the road and he was driving slowly and he heard someone ask for a light; that he stopped his car and put his car cigarette lighter in and that he saw two people there and that when he got the lighter out and gave the person

a light and when he put it back in where it was supposed to go that the person standing on the driver's side of the car grabbed him and he had a knife and he put the knife to his throat and that he reached down and picked up a gun that he had on the seat and fired, and then he drove off and drove home and went in the house and told his wife what had happened; that he didn't even look at his automobile when he got home, that he was so frightened.

And he testified that the knife introduced into evidence in this case was not his knife, and that he told his wife and son what happened that night, and that the pistol introduced into evidence was one which he was in the process of buying and that the pistol was in his house when the law came but he did not tell the deputy sheriff that the pistol was there; that at that time he didn't know whether he had hit the man he had shot at or not, that he didn't know until after the officers told him.

He testified on cross-examination that he shot two men before and each time in self-defense, that he has been convicted of whiskey some 20 years ago, and that he was convicted of escaping from prison about 40 years ago. He testified on redirect examination that he was protecting himself when he killed Gregory Ashe.

The defendant then introduced evidence in the form of testimony by Annie Hankerson, who testified that she is the wife of Johnnie Hankerson and has been for 35 or 40 years, that they have six children, that four of them are in the
9 courtroom with them today; that Johnnie Hankerson never goes out of the house with soiled clothes on and that the jacket which was introduced into evidence was clean when he left the house that night; that the defendant came in that night after having left and said, "Where is Mama?" and that he talked to her and told her that he stopped to give someone a light and when he did that the boy was reaching around him with a knife and that he shot, he didn't know whether he shot him but he shot at him, and he said maybe he ought to go back and tell the law, but he said, "If I shot someone, the law will be here and let me know about it." That she heard him tell her son W. B. about it also. On cross-examination she testified that she had been working that day and when he left the house that night he went to see someone about a hat, that the hard hat he was wearing didn't fit him right and he wanted another one, and that he was gone about two hours.

The defendant then introduced evidence in the form of testimony by Webster Hankerson, who testified that he is the son of the defendant, that he saw him when he went to his father's house that night, that his father came in and told him he had shot someone, and his father then left the room and went and talked to his mother; that his father as he went back with his mother told Webster Hankerson that if the law came to let him know. That sometime later the Sheriff came to the house and he went and got his mother and got his father. He testified that his father told him that he had shot at someone but did not know if he had hit him.

The defendant then introduced evidence in the form of testimony by Sonny Warner, who testified that he lives in Goldsboro, North Carolina, that he has known the defendant since 1965 and that he has a good general character and reputation in the community in which he lives.

The defendant then introduced evidence in the form of testimony by W. H. Needham of Rocky Mount, North Caro-
10 lina, who testified that he has known the defendant since 1965 and that the defendant has a good character and reputation.

The defendant also introduced evidence in the form of testimony by Jerry Bullock, who testified that he has known the defendant eight to ten years and that he has a good character and reputation.

That is some of the evidence as presented in the case. As I told you, you will recall what all the evidence is and you will recall what all the evidence is and you will decide the facts of the case from the evidence.

I charge you that under the law and evidence in this case it is your duty to return one of the following three verdicts. You must either find the defendant guilty of second degree murder or guilty of voluntary manslaughter or not guilty.

I charge that for you to find the defendant guilty of second degree murder, the State must prove two things beyond a reasonable doubt, first, that the defendant intentionally and without justification or excuse and with malice shot Gregory Ashe with a deadly weapon. Malice is not only hatred, ill-will or spite, as it is ordinarily understood, to be sure that is malice, but it always means that condition of mind which prompts a person to take the life of another intentionally or to intentionally inflict a wound with a deadly weapon upon another

which proximately results in his death without just cause, excuse or justification. A pistol, a .38 caliber pistol a pistol would be a deadly weapon. The second thing the State must prove and prove to you beyond a reasonable doubt is that the shooting was the proximate cause of Gregory Ashe's death. A proximate cause is a real cause, a cause without which Gregory Ashe's death would not have occurred. As I recall the evidence, both the State and the defendant stipulated that the death was caused by cerebral hemorrhage which resuled from a bullet wound in the deceased's heart. Nevertheless, you will have to be satisfied from the evidence and beyond a reasonable doubt that this shooting was the proximate cause of Gregory Ashe's death before you can find the defendant guilty in this case.

If the State proves beyond a reasonable doubt or it is admitted that the defendant intentionally killed Gregory
11 Ashe with a deadly weapon, or intentionally inflicted a wound upon Gregory Ashe with a deadly weapon, that proximately caused his death, the law raises two presumptions; first, that the killing was unlawful, and second, that it was done with malice. Then, nothing else appearing the defendant would be guilty of second degree murder. In other words, if you are satisfied from the evidence and beyond a reasonable doubt that the defendant intentionally killed Gregory Ashe with a deadly weapon, or that he intentionally inflicted a wound on Gregory Ashe with a deadly weapon and that wound proximately caused Gregory Ashe's death, then, as I told you, the law would raise two presumptions, that the killing was unlawful and second, that it was done with malice. Then there will be some other things I will charge you about, but, nothing else appearing, if you are satisfied of those two things beyond a reasonable doubt then you would find the defendant guilty of second degree murder.

As I told you, you will have to either find the defendant guilty of second degree murder or manslaughter or not guilty. In order to reduce the crime from second degree murder to manslaughter, the defendant must prove not beyond a reasonable doubt but simply to your satisfaction that there was no malice on his part. And in order to excuse his act altogether on the grounds of self-defense, the defendant must prove not beyond a reasonable doubt but simply to your satisfaction that he acted in self-defense. And I will charge you on self-defense in just a moment. But I do want to charge you that to negate

malice and thereby reduce the crime to manslaughter, the defendant must satisfy you of three things: first, that he shot Gregory Ashe in the heat of a passion, and this does not mean mere anger, it means that the defendant's state of mind was at the time so violent as to overcome his reason, so much so that he could not think to the extent necessary to form a deliberate purpose and control his actions. The second thing he must satisfy you of is that this passion was provoked by acts of Gregory Ashe which the law regards as adequate provocation. This may consist of anything which has a natural tendency to produce such passion in a person of average mind and dis-
12 position. And thirdly, that the shooting took place so soon after the provocation that the passion of a person of average mind and disposition would not have cooled.

To excuse the killing entirely on the grounds of self-defense, and the defendant contends that if you are satisfied beyond a reasonable doubt that he intentionally shot Gregory Ashe thereby proximately causing his death that he is excused in this case because he was acting in self-defense, and I want to instruct you that to excuse this killing entirely on the grounds of self-defense the defendant must satisfy you of four things: first, that it appeared to the defendant and he believed it to be necessary to shoot Gregory Ashe in order to save himself from death or great bodily harm. The defendant testified that at the time he shot Gregory Ashe or shot at Gregory Ashe that Gregory Ashe was holding a knife at his throat and had his arm around him, and he contends that that should satisfy you that he believed it was necessary to shoot him in order to save himself from death or great bodily harm. The second thing that you must be satisfied of—excuse me—that the defendant must satisfy you of is this, that the circumstances as they appeared to him at the time were sufficient to create such belief in the mind of a person of ordinary firmness, and it is for you, the jury, to determine the reasonableness of the defendant's belief from the circumstances as they appeared to him at the time. In making this determination you should consider the circumstances as you find them to have existed from the evidence, including the size, age and strength of the defendant as compared to Gregory Ashe, the fierceness of the assault, if any, upon the defendant, whether or not Gregory Ashe had a weapon in his possession. And the third thing the defendant must satisfy you of is that he was not the aggressor. If he

voluntarily and without provocation entered into a fight with Gregory Ashe, he was the aggressor, unless he thereafter attempted to abandon the fight and gave notice to Gregory Ashe that he was doing so. One enters a fight voluntarily if he uses towards his opponent abusive language which considering all the circumstances is calculated and intended to bring on a fight. And the fourth thing that the defendant must satisfy you of is that he did not use excessive force, that is, more force
13 than reasonably appeared to be necessary to the defendant at the time. Again, it is for you, the jury, to determine the reasonableness of the force used by the defendant under all the circumstances as they appeared to him at the time.

If you find that the defendant acted properly in self-defense, he would not be guilty. However, if the defendant though otherwise acting in self-defense used excessive force, the defendant would be guilty of voluntary manslaughter.

In this case the defendant has introduced evidence that he is a man of good character and reputation. I won't recount all of that again for you but you will recall the witnesses who testified that the defendant was a man of good character and reputation. I want to charge you that you can consider this evidence in two ways, or you may consider it for two purposes. First, if you believe all or any part of this evidence and find that it bears upon the defendant's truthfulness, you may consider it together with all other facts or circumstances bearing upon his truthfulness in deciding whether you will believe or disbelieve his testimony at this trial. And secondly, you may consider this evidence, although good character or good reputation is not an excuse for crime, the law recognizes that a person of good character may be less likely to commit a crime than one who lacks that character. Therefore, if you believe from the evidence that the defendant has a good character, you may consider this fact in your determination of the defendant's guilt or innocence and give it such weight as you decide it should receive in connection with all of the other evidence. There is also some evidence in this case, and I won't recount all of that again for you, that the defendant some years ago has pled guilty to some other crimes. He testified that he had once been convicted of escape and once he was convicted of assault, and you will recall the things he said he had been convicted for.

I want to charge you that you may consider that evidence in one way only and that is considering the nature of the crimes

which the defendant testified he had been convicted of
14 or pled guilty to, if you think that that bears upon his truthfulness then you may take that into account in deciding whether you believe or disbelieve him as a witness. But you may not consider that evidence in determining the guilt of the defendant in this case; that is, do not find him guilty in this case because he has pled guilty to another crime or been found guilty of another crime at another time.

The State contends that the defendant ran from the scene that night or drove away from the scene that night and did not return, did not report it to the police, and the State contends that that is evidence of flight by the defendant. Evidence of flight, if you believe that evidence, may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of this circumstance is not sufficient, in itself, to establish the defendant's guilt. So if you believe the evidence of flight, I want to instruct you not to find the defendant guilty on that evidence alone; you will have to consider that together with all other evidence in the case in determining whether the State has satisfied you beyond a reasonable doubt that the defendant is guilty of either of the two crimes of which you may find him guilty, if you do not find him not guilty.

COURT: Is there anything else you want charged, Mr. Rosser?

MR. ROSSER: No, sir.

So I charge you, Ladies and Gentlemen, if you find from the evidence and beyond a reasonable doubt that on or about September 29, 1974, the defendant, Johnnie B. Hankerson, intentionally and with malice and without justification or excuse, shot Gregory Ashe with a deadly weapon, thereby proximately causing Gregory Ashe's death, nothing else appearing, it would be your duty to return a verdict of guilty of second degree murder. However, if you do not so find, or have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of second degree murder.
15 If you do not find the defendant guilty of second degree murder, you must consider whether he is guilty of voluntary manslaughter. And if you find from the evidence beyond a reasonable doubt that on or about September 29, 1974, the defendant, Johnnie B. Hankerson, intentionally shot

Gregory Ashe with a deadly weapon, thereby proximately causing Gregory Ashe's death, but are satisfied that the defendant killed without malice in the heat of sudden passion, nothing else appearing, or used excessive force in exercising the right of self-defense, it would be your duty to return a verdict of guilty of voluntary manslaughter. However, if you do not find, or have a reasonable doubt as to one or more of these things, you would find the defendant not guilty.

I will let you retire in just a moment. I suggest that when you do retire you appoint one of your members a foreman so that he or she could poll you in the jury room and speak for you when you return.

You will have to reach a unanimous verdict before you can find the defendant either guilty of second degree murder or manslaughter or not guilty.

If you want any further instructions, you are entitled to have them. However, you will all have to come back to the courtroom to get them; you can't send one person back to get them for you and you can't get the deputy sheriff to get them for you.

So at this time I instruct you, Ladies and Gentlemen, to retire to your room and render a true and just verdict.

(JURY RETIRES AT 3:43 O'CLOCK P.M.)

(JURY RETURNS TO THE COURTROOM FOR FURTHER INSTRUCTIONS AT 4:32 O'CLOCK P.M. AND THE FOLLOWING PROCEEDINGS ARE HAD.)

CLERK: Ladies and Gentlemen of the Jury, have you agreed upon your verdict?

JURY FOREMAN: No. We would like to have the Judge to clarify again the difference between manslaughter and second degree murder.

COURT: All right. Excuse me. I thought you had reached a verdict. Second degree murder is the intentional killing without justification or excuse and with malice. Voluntary manslaughter is the intentional killing without justification and excuse and without malice. In other words, the difference between second degree murder and manslaughter is the absence of malice in manslaughter. I defined malice for you. I
16 will be glad to define it for you again if you want me to.

Also, I want to instruct you that the charge I gave you as to self-defense would apply equally to manslaughter as it would to second degree murder in that if you find the defendant was justified or excused in the killing because he was acting

in self-defense then you would find him not guilty as to either one. I explained to you a little bit more maybe than you asked, but I thought you needed that clarified, perhaps. Is that enough explanation or would you like further explanation? Well, I will define malice for you. The difference between second degree murder and manslaughter, as I told you, is that it is not necessary for the State to prove malice in order for you to find him guilty of manslaughter. As I told you before, malice is not only hatred, ill-will or spite, as it is ordinarily understood, to be sure that is malice, but it also means that condition of mind which prompts a person to take the life of another intentionally, or to intentionally inflict a wound with a deadly weapon upon another which proximately causes his death without just cause, excuse or justification. That is the legal definition of malice.

Unless you want further instructions, I will let you retire and resume your deliberations. If you want any further instructions. don't hesitate to come out and ask for them.

STATE OF NORTH CAROLINA v. JOHNNIE B. HANKERSON

No. 56

(Filed 17 December 1975)

1. Criminal Law § 90— State's introduction of exculpatory statements by defendant

The State is not bound by the exculpatory portions of a confession which it introduces in a homicide case if there is other evidence tending to throw a different light on the circumstances of the homicide.

2. Homicide § 21— second degree murder—exculpatory statements—sufficiency of evidence for jury

The State's evidence was sufficient for the jury in this prosecution for second degree murder, notwithstanding the State introduced exculpatory statements by defendant that he shot the victim while the victim was reaching into defendant's car with a knife at defendant's throat and a hand on his chest, where the State's evidence cast doubt on defendant's version by tending to show that (1) defendant fled the scene at a great rate of speed; (2) defendant originally lied about the gun used in the shooting and told the truth about it after his wife turned it in to the police; (3) deceased had no grease on his hands although defendant claimed a grease spot on his shirt was from being grabbed by the victim; (4) the victim was found with a cigarette in one hand although defendant contended the victim used two hands against him; (5) the victim was right handed and defendant claimed the victim wielded the knife with his left hand; (6) defendant said he was stopped by two persons while the State's evidence was that the victim was alone; and (7) the victim had never been seen with a knife similar to one recovered from defendant's vehicle.

3. Criminal Law § 86— prior misconduct — question is good faith

Defendant failed to show that the district attorney's question to him on cross-examination as to how many people he had shot before was asked in bad faith.

4. Criminal Law § 162—failure to strike testimony—absence motion to strike

The trial court did not err in failing to strike defendant's testimony regarding prior arrests which did not result in conviction where there was no motion to strike such testimony.

18 5. Criminal Law § 113—recapitulation of evidence—misstatement—collateral matter

The trial court's inaccurate statement during recapitulation of the evidence in a homicide case that defendant testified he had been convicted of assault was a misstatement upon a collateral matter and not a ground for a new trial since no request for correction was made before the case was submitted to the jury.

6. Homicide § 28— final mandate — absence of acquittal by self-defense — additional instructions

In this homicide prosecution, the trial court's error in failing to include in its final mandate the theory of acquittal by reason of self-defense was cured by additional instructions given by the court after the jury had begun its deliberations.

7. Homicide §§ 14, 24— absence of malice — self-defense — burden of proof on defendant — unconstitutionality — nonretroactivity

Under the decision of *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the Due Process Clause of the Fourteenth Amendment prohibits the use of our long-standing rules in homicide cases that, in order to rebut the presumption of malice, defendant must prove to the satisfaction of the jury that he killed in the heat of a sudden passion, and in order to rebut the presumption of unlawfulness, defendant must prove to the satisfaction of the jury that he killed in self-defense. However, the *Mullaney* decision is not retroactive and applies only to trials conducted on or after 9 June 1975.

8. Homicide §§ 14, 24— presumption of malice and unlawfulness — constitutionality

The *Mullaney* decision does not preclude use of the presumptions of malice and unlawfulness upon proof beyond

a reasonable doubt of a killing by the intentional use of a deadly weapon; nor does it prohibit making the presumptions mandatory in the absence of contrary evidence or permitting the logical inferences from facts proved to remain and be weighed against contrary evidence if it is produced.

Justice LAKE concurring in result.

APPEAL by defendant pursuant to N. C. Gen. Stat. 7A–30(2) to review the decision of the Court of Appeals reported in 26 N.C. App. 575, 217 S.E. 2d 9 (1975), which found no error, *Arnold J.*, dissenting, in the trial before *Webb, J.*, at the November 21, 1974 Session of NASH County Superior Court.

After the appeal was filed in this Court on July 31, 1975, defendant moved to amend the record on August 19, 1975, to note additional exceptions and assignments of error which would raise for review additional questions suggested by *Mullaney v. Wilbur*, 421 U.S. 684, decided on June 9, 1975. This motion was allowed on September 2, 1975, and the case argued on September 10, 1975.

19 Defendant was charged with the second degree murder of Gregory Ashe and entered a plea of not guilty. It was stipulated that had Dr. D. E. Scarborough, who performed the postmortem examination, been present at trial he would have testified that Gregory Ashe died on September 29, 1974, as a result of massive hemorrhage resulting from a gunshot wound to the heart.

Evidence for the State tended to show that on the night of September 29, 1974, Lorenzo Dancy, Wilbert Whitley, and the deceased, Gregory Ashe, left a dance hall and drove to a poolroom in Whitakers. Ashe was driving his car. Upon arrival at the poolroom, they discovered that it was closed. Ashe was unable then to restart his car. Ashe asked Dancy and Whitley for a match to light a cigarette. Neither had a match. Whitley announced that he was going to his home, one block away, and began walking. Dancy and Ashe were also walking away from the car when Ashe said that he was going back to "crank" the car. Dancy indicated that he was going on with Whitley. Dancy testified that he yelled for Whitley to wait and then proceeded to walk after Whitley. When last seen alive by Dancy, Ashe was seen walking alone back towards his car.

Moments later Dancy and Whitley each heard a gun fire. Dancy heard Ashe exclaim that he was shot and hollered this information to Whitley. A yellow and black Plymouth "Satellite" was observed pulling away at a fast rate of speed. It did not stop when it reached the nearby intersection of U.S. 301. Dancy and Whitley had differing accounts of whether the car left before or after Dancy hollered.

The shooting had occurred some time after 11:00 o'clock. Because of the darkness it was difficult to find Ashe. Around 12:00 o'clock, Ashe was discovered lying face down in a field about thirty feet from the road. A cigarette, which had been lit but which was now out, was in Ashe's hand. The body was removed at 4:00 or 5:00 o'clock that morning.

After determining the identity of the owner of the Plymouth, several law enforcement officers, including Deputy Sheriff M. M. Reams went to defendant's home, advised defendant of his rights, and questioned him. Defendant told Deputy Reams that he had been to Whitakers, had shot a person who had grabbed him and tried to cut his throat but did not know whether he had hit him. Reams testified that defendant's car was

20 searched with his consent and a knife was found in the middle of the front seat. Also found in the car was a ".30–06," ammunition for the ".30–06," and a hunting knife. Blood was observed on the driver's side of the car, just behind the door. Defendant gave Reams a shirt with a grease spot and stated that was where he had been grabbed. When asked about the pistol used in the shooting (*not* the ".30–06"), defendant told Reams that he was "in the process of buying" it but had already returned it to the seller, whom he refused to identify.

On cross-examination Reams gave this additional account of defendant's statements: Defendant was driving his Plymouth "Satellite" automobile near the poolroom when a man stopped him and asked him for a light. Defendant gave the man the cigarette lighter from the dash of his automobile. Defendant felt someone "shaking the car, shaking the right door that was locked." Defendant put the cigarette lighter back in the holder and when he turned around "the man" was reaching in with a knife at his throat and had a hand on defendant's chest. Defendant reached down, got a revolver, and "shot the man who already had his hand on his left chest."

Officer Reams also testified that after taking defendant's statement he returned to the morgue and examined the deceased's hands. He found no grease on them. Several witnesses for the State testified that they had never seen the deceased with a knife like the one in evidence found in defendant's car.

Defendant testified giving the following account of the incident: He was driving his Plymouth automobile slowly over a road containing large holes when someone asked for a light. Through his car mirror, defendant could see two men. One of them walked up to the car and defendant reached over to the dash of the car, pushed in the cigarette lighter, and gave the lighter to him. On returning the lighter to its holder, defendant felt the car move, and looked and noticed the second man standing on the right-hand side of the car. As he turned back to his left, the first man reached into his car, seized him by the left shoulder with his right hand and put a knife to defendant's throat with his left hand. Defendant felt the knife at his throat, grabbed his gun and shot. He surmised that his assailant dropped his knife in the car since it did not belong to
21 the defendant. Defendant admitted that he lied to the police about the whereabouts of the gun. He said:

"The pistol was in my house at the time the law came there. He did ask me for the pistol then. I told him I had returned it to the person I got it from. I had not returned it. It was in the house right then.

* * * * *

"The reason I didn't tell the Sheriff the truth about where the pistol was was because at that time I just wasn't thinking, but after I got up here in jail I decided I might as well go ahead and tell them. My wife had already given it to the officers at that time. It is true that I never told them where the pistol was. If they had wanted to search the house they could have found it right there under the mattress. I did not hide the gun. That was just to keep it away from the children."

Defendant's wife, however, testified that she got the pistol from defendant's drawer where "I am sure he put it."

In rebuttal the State introduced evidence that Gregory Ashe was right-handed.

The jury found defendant guilty of second degree murder. He was sentenced to not less than 20 nor more than 25 years imprisonment. The Court of Appeals found no error, Arnold, J., dissenting.

Rufus L. Edmisten, Attorney General, by Claude W. Harris, Assistant Attorney General, for the State.

L. G. Diedrick, W. O. Rosser and Roland Braswell, Attorneys for defendant appellant.

EXUM, Justice.

I

Defendant assigns as error the denial of his motions for judgment as of nonsuit. Judge Arnold's dissent was on the basis that nonsuit should have been allowed. Reviewing this assignment, we consider all of the evidence actually admitted, whether from the State or defendant, in the light most favorable to the State, resolve any contradictions and discrepancies therein in the State's favor, and give the State the benefit of all reasonable inferences from the evidence. *State v. Cutler*,
22 271 N.C. 379, 382, 156 S.E. 2d 679, 681 (1967). Defendant more specifically urges that this case comes within the rule that, "[w]hen the State introduces in evidence exculpatory statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by these statements. While the intentional killing of another with a deadly weapon raises the presumption that the killing was unlawful and done with malice, this rule of law does not mean that the burden of showing an unlawful killing does not rest with the State. When the State's evidence and that of the defendant are to the same effect and tend only to exculpate the defendant, motion for nonsuit should be allowed. *State v. Carter*, 254 N.C. 475, 119 S.E. 2d 461." *State v. Johnson*, 261 N.C. 727, 730, 136 S.E. 2d 84, 86 (1964).

In *State v. Johnson, supra*, a murder prosecution, the State's only evidence that defendant committed a homicide was a confession that established a perfect self-defense. Circumstantial evidence corroborated the confession. Defendant's evidence at trial was to the same effect. In this context we held defendant entitled to a nonsuit and reversed a conviction for manslaughter. *State v. Carter, supra*, presented basically the same situation. There was no evidence which tended to contradict or impeach defendant's confession or testimony at trial that she acted lawfully in the defense of another.

[1] The State contends, however, and we agree that this case falls more squarely within the rule that the State is not bound by the exculpatory portions of a confession which it introduces, if there is "other evidence tending to throw a different light on the circumstances of the homicide." *State v. Bright*, 237 N.C. 475, 477, 75 S.E. 2d 407, 408 (1953); see also *State v. Bolin*, 281 N.C. 415, 189 S.E. 2d 235 (1972) and *State v. Cooper*, 273 N.C. 51, 159 S.E. 2d 305 (1968). In *State v. Bright, supra*,

the State introduced defendant's statement that he killed his wife accidentally while they were scuffling on the bed. We held, however, that evidence "such as the absence of powder burns, the location and direction of the fatal wound [and] the conduct of the defendant . . ." was sufficient to survive a motion for nonsuit, and we affirmed a manslaughter conviction. [2] We hold that nonsuit in this case was properly denied in view of evidence which casts doubt on defendant's version of the incident. This evidence is to the effect that: (1) defendant fled the scene at a great rate of speed; (2) defendant
23 originally lied about the gun and decided to tell the truth about it after his wife had turned it in to the police; (3) the deceased had no grease on his hands although defendant claimed the grease spot on his shirt was from being grabbed by the deceased; (4) the deceased was found with a cigarette in one hand, although defendant claims the deceased used two hands against him; (5) the deceased was right-handed although defendant claims that deceased wielded the knife with his left hand; (6) defendant says he was stopped by two persons while the State's evidence was that the deceased, when last seen alive moments before the shooting, was alone; (7) the deceased had never been seen with a knife in his possession similar to the one recovered from defendant's vehicle.

While none of these circumstances taken individually flatly contradicts defendant's statement, taken together they are sufficient to "throw a different light on the circumstances of the homicide" and to impeach the defendant's version of the incident. The State is not bound, therefore, by the exculpatory portions of the defendant's statement. The case is for the jury.

II

On cross-examination of the defendant by the district attorney the following occurred:

"Q. How many people have you ever shot before?

OBJECTION: OVERRULED: EXCEPTION

DEFENDANT'S EXCEPTION No. 3.

Q. Go ahead and tell us exactly how many?
A. I have shot one.
Q. Is that all?
A. Two.

Q. Is that all?
A. Yes."

As the cross-examination continued without further objection defendant admitted having been "convicted of whiskey" and "convicted one time of escaping from prison. . . I have not been convicted of anything else. I have been up once before in
North Carolina for assault; this is the second time. That
24 was for shooting. It was in self-defense. I came clear of that." On recross-examination the defendant testified: "I have not been previously convicted of assault. They kept me in jail three or four nights the time the man was hitting me with a stick. Years back a fellow whacked me with a knife and he was shot in the leg but I didn't go to jail for it. I just paid his hospital bill." Apparently with reference to this testimony the trial judge, summarizing the evidence, stated to the jury that the defendant "testified that he had once been convicted of escape and once he was convicted of assault, and you will recall the things he said he had been convicted for."

Defendant now assigns as error: first, the overruling of his objection to the district attorney's question, "How many people have you ever shot before?"; second, failure of the court to strike "defendant's testimony as to any prior arrests that did not result in a conviction"; and third, the statement of the trial judge hereinabove set out recapitulating the testimony of the defendant.

[3] With regard to the district attorney's question defendant properly concedes the right of the State to cross-examine defendant as to specific acts of misconduct, *State v. Gainey*, 280 N.C. 366, 185 S.E. 2d 874 (1972), and properly concedes that unlawfully shooting other people would be such misconduct. Defendant contends, however, that the question was patently asked in bad faith since the district attorney must have been aware that the defendant was acquitted of that charge. Defendant, however, testified that he had shot people on *two* other occasions only one of which resulted in an acquittal by reason of self-defense. There is no showing in the record that the district attorney in fact knew the official outcome of these assaults. Apparently one of them never came to trial.

[4] As to the trial judge's failure to strike defendant's testimony regarding prior arrests which did not result in convictions, suffice it to say there was no motion to strike any of this testimony. Apparently defendant was satisfied at trial with

his full explanation before the jury of the outcome of the two shooting incidents. The trial judge was not required, *sua sponte*, to strike this testimony. *State v. Battle*, 267 N.C. 513, 148 S.E. 2d 599 (1966).

[5] Although defendant admitted he paid hospital bills for one of his victims, he said also that he "didn't go to jail
25 for it" and that he had "not previously been convicted of assault." The trial judge did, it seems, inaccurately recapitulate the defendant's testimony on this point. The misstatement is understandable. Nevertheless "inaccurate statements of this character are not ground for a new trial unless called to the court's attention with request that correction be made before the case is submitted to the jury." *State v. Revis*, 253 N.C. 50, 53, 116 S.E. 2d 171, 174 (1960). In *State v. Cantrell*, 230 N.C. 46, 51 S.E. 2d 887 (1949) relied on by defendant on this point, defendant was tried on a charge of carnally knowing his ten year old child. In dictume this Court volunteered the observation that it would have been error for the trial judge to say, in recapitulating the evidence, that defendant "admitted . . . he had been tried and convicted of an assault with intent to commit rape on his daughter Dorline Shelton" unless such an admission appeared in the record. (It does not appear in the opinion but the record reveals that Dorline Shelton was not the prosecutrix, but another daughter of the defendant.) Noting that no exception was taken or assignment of error directed to this portion of the charge, this Court recognized that the defendant may indeed have made such an admission although none appeared in the record. Assuming the correctness of this dictum, the supposed misstatement there considered is clearly distinguishable from the one here. In prosecutions for various kinds of illicit sexual activity, our decisions have been characterized as being "markedly liberal in holding evidence of similar sex offenses admissible" on the question of guilt. 1 Stansbury's North Carolina Evidence 299 (Brandis Rev. 1973). It might then be considered that the assumed misstatement in *Cantrell* was one of a fact bearing directly on defendant's guilt. This Court has said that "a statement of a material fact not shown in the evidence constitutes reversible error" whether or not called to the trial court's attention. *State v. McCoy*, 236 N.C. 121, 124, 71 S.E. 2d 921, 923 (1952). The misstatement here complained of was clearly upon a collateral matter.

These assignments of error are, consequently, overruled.

III

[6] In his final mandate the trial judge failed to reiterate and specify that self-defense was a possible theory of acquittal. Defendant contends that under *State v. Dooley*, 285 N.C. 158, 203 S.E. 2d 815 (1974) this is reversible error. After the jury had been deliberating approximately forty-five minutes,
26 however, they returned to the courtroom to ask for clarification on the distinction between manslaughter and murder in the second degree. In the course of his instructions responsive to this inquiry the trial judge charged in addition as follows:

> "Also, I want to instruct you that the charge I gave you as to self-defense would apply equally to manslaughter as it would to second degree murder in that if you find the defendant was justified or excused in the killing because he was acting in self-defense then you would find him not guilty as to either one."

While *Dooley* does require the trial judge to include in his final mandate the theory of acquittal by reason of self-defense where it has been raised by the evidence, failure here to do so was cured, in our opinion, by the additional instructions. *State v. Brooks*, 225 N.C. 662, 36 S.E. 2d 238 (1945). Certainly the additional instructions render any error of omission in the final mandate harmless beyond a reasonable doubt.

IV

On June 9, 1975, the United States Supreme Court decided *Mullaney v. Wilbur*, 421 U.S. 684, which held that a Maine jury instruction requiring a defendant being tried for murder to prove by a preponderance of the evidence, in order to reduce the murder to manslaughter, that he acted in the heat of passion on sudden provocation, violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution, as that clause was interpreted in *In re Winship*, 397 U.S. 358 (1970) to require the prosecution to prove beyond a reasonable doubt every fact necessary to constitute a crime. It was subsequently re-explained in *Faretta v. California*, ... U.S. ...., 95 S.Ct. 2525, n. 15 (June 30, 1975) that the right of the defendant to have this burden placed on the State, though not literally expressed in any particular provision of the Consti-

tution, was essential to due process of law in a fair adversary process.

Defendant contends that under the rationale of *Mullaney* the trial judge's instructions to the jury in this case violate Fourteenth Amendment Due Process. While the trial judge in defining second degree murder and manslaughter and in his final mandate to the jury placed upon the State the burden to prove beyond a reasonable doubt both malice and
27 unlawfulness, i.e, without justification or excuse, he also instructed the jury, in pertinent part, as follows:

> *"If the State proves beyond a reasonable doubt or it is admitted that the defendant intentionally killed Gregory Ashe with a deadly weapon, or intentionally inflicted a wound upon Gregory Ashe with a deadly weapon, that proximately caused his death, the law raises two presumptions; first, that the killing was unlawful, and second, that it was done with malice. Then, nothing else appearing, the defendant would be guilty of second degree murder. . . .*
>
> "As I told you, you will have to either find the defendant guilty of second degree murder or manslaughter or not guilty. *In order to reduce the crime from second degree murder to manslaughter, the defendant must prove not beyond a reasonable doubt but simply to your satisfaction that there was no malice on his part. And in order to excuse his act altogether on the grounds of self-defense, the defendant must prove not beyond a reasonable doubt but simply to your satisfaction that he acted in self-defense.* And I will charge you on self-defense in just a moment. But I do want to charge you that to *negate malice and thereby reduce the crime to manslaughter, the defendant must satisfy you of three things:* first, that he shot Gregory Ashe in the heat of a passion. . . . The second thing he must satisfy you of is that this passion was provoked by acts of Gregory Ashe which the law regards as adequate provocacation. . . . And thirdly, that the shooting took place so soon after the provocation that the passion of a person of average mind and disposition would not have cooled.

> *"To excuse the killing entirely on the grounds of self-defense . . . the defendant must satisfy you of four things:* first, that it appeared to the defendant and he believed it to be necessary to shoot Gregory Ashe in order to save himself from death or great bodily harm. . . . The second thing that you must be satisfied of—excuse me—that the defendant must satisfy you of this, that the circumstances as they appeared to him at the time were sufficient to create such belief in the mind of a person of ordinary firmness. . . . And the third thing the defendant must satisfy you of is that he was not the aggressor. . . . And the fourth thing that the defendant must satisfy you of is that he did not use excessive force. . . .
>
> 28 "If you find that the defendant acted properly in self-defense, he would not be guilty. However, if the defendant though otherwise acting in self-defense used excessive force, the defendant would be guilty of voluntary manslaughter." (Emphasis supplied.)

[7] We hold that by reason of the decision in *Mullaney* the Due Process Clause of the Fourteenth Amendment prohibits the use of our long-standing rules in homicide cases that a defendant in order to rebut the presumption of malice must prove to the satisfaction of the jury that he killed in the heat of a sudden passion and to rebut the presumption of unlawfulness, that he killed in self-defense. The instructions given here insofar as they placed these burdens of proof on the defendant violate the concept of due process announced for the first time in *Mullaney*. We decline, however, for reasons hereinafter stated, to give *Mullaney* retroactive effect in North Carolina. We hold that because the trial judge instructed the jury in accordance with our law of homicide as it stood, and in a trial conducted, before the *Mullaney* decision, the defendant is not entitled to the benefit of the *Mullaney* doctrine. We will, however, apply the decision to all trials conducted on or after June 9, 1975.

The law of Maine and the precise issue it presented was succintly stated by the Supreme Court in *Mullaney:*

> *"Absent justification or excuse, all intentional or criminally reckless killings are felonious homicides. Felonious homicide is punished as murder—i.e., by life imprisonment—unless the defendant proves by a fair preponder-*

ance of the evidence that it was committed in the heat of passion on sudden provocation, in which case it is punished as manslaughter—i.e., by a fine not to exceed $1,000 or by imprisonment not to exceed 20 years. The issue is whether the Maine rule requiring the defendant to prove that he acted in the heat of passion on sudden provocation accords with due process." 421 U.S. at 691–92. (Emphasis supplied.)

A portion of the trial judge's instructions to the jury in Maine were summarized in *Mullaney* as follows:

"[*T*]*hat if the prosecution established that the homicide was both intentional and unlawful, malice aforethought was to be conclusively implied unless the defendant proved by a fair preponderance of the*
29 *evidence that he acted in the heat of passion on sudden provocation.* The court emphasized that *'malice aforethought and heat of passion on sudden provocation are inconsistent things.'* [Appendix to the Record] at 62; thus, by proving the latter the defendant would negate the former and reduce the homocide from murder to manslaughter. The court then concluded its charge with elaborate definitions of 'heat of passion' and 'sudden provocation.'" *Id.* at 686–87. (Emphasis supplied.)

Maine's conclusive implication of malice which arose from proof of an unlawful and intentional killing meant simply that upon proof of these things the defendant was guilty of murder unless the defendant proved by a fair preponderance of the evidence that he acted in heat of passion on sudden provocation where the issue of heat of passion was raised. Thus Maine's law under these circumstances relieved the State of the burden of proving both malice and the absence of heat of passion. In this the Supreme Court found that due process was wanting. It said:

"Maine law requires a defendant to establish by a preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter. Under this burden of proof a defendant can be given a life sentence when the evidence indicates that it is *as likely as not* that he deserves a significantly lesser sentence. This is an intolerable result in a society

where, to paraphrase Mr. Justice Harlan, it is far worse to sentence one guilty only of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter. *In re Winship,* 397 U.S. at 372 (concurring opinion). We therefore hold that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." *Id.* at 703–704.

In North Carolina, our law of homicide pertinent to the questions here raised has not been substantially changed since it was enunciated in 1864 in *State v. Ellick,* 60 N.C. 450. This Court there said:

"When it is proved that one has killed intentionally, with a deadly weapon, the burthen of showing justification, excuse or mitigation, is upon him. *Id.* at 459.

* * * * *

30 ". . . the fact of the homicide must be proved *by the State;* but if found or admitted, the *onus* of showing justification, excuse or mitigation, is upon the *prisoner.*" *Id.* at 462.

The Court in *Ellick* concluded its opinion by saying that any fact which the State is required to establish must be proved beyond a reasonable doubt; but as to facts which the prisoner is required to establish, the jury must be satisfied by the testimony that they are true. *Ellick* has been cited as authoritative in *State v. Phillips,* 264 N.C. 508, 515, 142 S.E. 2d 337, 341 (1965) and *State v. Creech,* 229 N.C. 662, 673, 51 S.E. 2d 348, 357 (1949).

Another of our early cases on the subject was *State v. Willis,* 63 N.C. 26 (1868), which while holding that the defendant need not prove mitigation or justification by a preponderance of the evidence, nevertheless approved the following instruction given by the trial judge:

"[W]hen it is proved or admitted that one killed another intentionally, with a deadly weapon, the burden of showing justification, excuse or mitigation is on him, and all the circumstances of such justification, excuse or mitigation are to be satisfactorily proved by him, unless they appear in the evidence against him; that the fact of killing being proved or admitted, nothing more

appearing, the law presumes such killing to have been done in malice, and so to be murder; that the circumstances of justification, excuse or mitigation, are to be *satisfactorily* proved, not proved as the State is required to prove an essential fact, that is beyond a reasonable doubt, for the doctrine of reasonable doubt is never applied to the condemnation of a prisoner, but to his acquittal; and that the jury must be satisfied by the testimony offered in the case on either side that the matter in justification, excuse or mitigation is true." *Id.* at 26–67. (Emphasis supplied.)

The Court said further:

"We prefer to stand *super antiquas vias*, and to adhere to the rules laid down in the *State v. Ellick*, above referred to. In that case the erroneous statement which we had inadvertently made in the *State v. Peter Johnson*, [48 N.C. 266 (1855)] that it was incumbent on the prisoner to establish the matters of excuse or extenuation
31 beyond a reasonable doubt, is corrected. In it is also corrected wht we consider as erroneous in the decision of the Court in *Commonwealth v. York* [9 Met. (50 Mass.) 93 (1845)], that the matters of excuse or extenuation which the prisoner is to prove, must be decided according to the preponderance of evidence. It is more correct to say, as we think, that they must be proved to the satisfaction of the jury." *Id.* at 29.

In *State v. Vann*, 82 N.C. 631, 635 (1880), Justice Dillard, elucidating the law laid down in *Ellick* and *Willis*, wrote:

"In an indictment for murder, the two constituents of the crime, to-wit, a voluntary killing and malice aforethought, must be proved by the state, as it makes the charge; and as the accused is presumed to be innocent until the contrary is shown, both of these elements must be proved. The killing being shown, then the other ingredient, malice prepense, is also proved as a fact in the eyes of the law, not by evidence adduced, but by a presumption that the law makes from the fact of the killing. And these two essential facts being thus established, the legal conclusion thereon is, that the offense charged is murder. (Citations omitted.)

"But the implication of malice, made by the law and taken as a fact, is not conclusive on the party accused, but may be rebutted. He may show, if he can, by his proofs, that there was no malice prepense and thereby extenuate to manslaughter, or make a case of justifiable or excusable homicide, or a case of no criminality at all by proof of insanity at the time of the act committed, disabling him to know right from wrong. (Citations omitted.) *The burden lies on the accused to make these proofs, if he can; otherwise, the conclusion of murder, on a malice implied, will continue against him and will call for, and in law, oblige a conviction by the jury.*" (Emphasis supplied.)

In *State v. Miller*, 112 N.C. 878, 885, 17 S.E. 167, 169 (1893), the Court pointed out "that when the killing with a deadly weapon is proved and admitted the burden is shifted upon the prisoner, and he must satisfy the jury, if he can do so from the whole of the testimony, as well that offered for the State as for the defense, that matter relied on to show mitigation or excuse is true."

32 These early cases were decided before the enactment of N.C. Pub. Laws 1893, ch. 85 (now N. C. Gen. Stat. 14–17), which divided murder in two degrees. This act made certain specified kinds of murder, including a deliberate and premeditated killing, murder in the first degree. All other kinds of murder were made by the statute murder in the second degree. *State v. Benton*, 276 N.C. 641, 657, 174 S.E. 2d 793 (1970). Homicide cases decided subsequent to this statute continued to sanction the presumptions of unlawfulness and malice but refused to recognize any presumption of premeditation or deliberation. *State v. Brown*, 249 N.C. 271, 106 S.E. 2d 232 (1958); *State v. Absher*, 226 N.C. 656, 40 S.E. 2d 26 (1946); *State v. Keaton*, 206 N.C. 682, 175 S.E. 296 (1934); *State v. Rhyne*, 124 N.C. 847, 33 S.E. 128 (1899); *State v. Fuller*, 114 N.C. 885, 19 S.E. 797 (1894). Modern, accurate and sufficient statements of the rules regarding these presumptions may be found in *State v. DuBoise*, 279 N.C. 73, 181 S.E. 2d 393 (1971); *State v. Winford*, 279 N.C. 58, 181 S.E. 2d 423 (1971).

The foregoing authorities establish that from 1864 to 1975, 111 years, the law of this State has been this: when it established by a defendant's judicial admission, or the State proves beyond a reasonable doubt that the defendant intentionally in-

flicted a wound upon the deceased with a deadly weapon which proximately caused death, the law raises two presumptions against the defendant: (1) the killing was unlawful, and (2) it was done with malice. Nothing else appearing in the case the defendant would be guilty of murder in the second degree. When these presumptions arise the burden devolves upon the defendant to prove to the satisfaction of the jury the legal provocation which will rob the crime of malice and reduce it to manslaughter or which will excuse the killing altogether on the ground of self-defense. If defendant rebuts the presumption of malice only, the presumption that the killing was unlawful remains, making the crime manslaughter. The jury instructions complained of here were in accordance with these long established rules.

This Court has never defined precisely what is meant by "satisfying" the jury. It has been clear, however, from the earliest cases that satisfying the jury meant something other than persuading beyond a reasonable doubt and persuading by a preponderance of the evidence. *State v. Freeman*, 275
33 N.C. 662, 170 S.E. 2d 461 (1969); *State v. Barrett*, 132 N.C. 1005, 43 S.E. 832 (1903). This Court said in *Barrett*:

> "[T]he prisoner must satisfy the jury, neither by a reasonable doubt nor yet by a preponderance of the evidence, but simply satisfy them, of the existence of facts and circumstances which mitigate the offense or which make good a plea of self-defense."

Satisfying the jury, the standard long adopted by this Court and utilized in the instructions now under consideration means, we believe, a standard no greater and at the same time one not significantly less than persuasion by a preponderance of the evidence. Satisfying the jury means that there must be some evidence offered of all elements of heat of passion on sudden provocation or of self-defense, as the case may be, and that this evidence must satisfy or persuade the jury of the truth of the existence of these provocations—one which robs the crime of malice and the other which excuses it altogether.

Under the Maine rules considered in *Mullaney* when the State proved beyond a reasonable doubt that the killing was (1) intentional, and (2) unlawful, the jury was told that the defendant would be guilty of murder unless he proved by a preponderance of the evidence that he killed in the heat of

passion in which case he could be convicted only of manslaughter. Under North Carolina rules when the State proved beyond a reasonable doubt a killing proximately resulting from the intentional use of a deadly weapon the jury here was told, in effect, that defendant would be guilty of murder in the second degree unless he "satisfies" the jury that he killed in the heat of sudden passion or in self-defense. The instructions here under consideration, therefore, like those in Maine, unconstitutionally relieved the prosecution of the burden of proving beyond a reasonable doubt malice and unlawfulness when the issues of their existence were properly raised.

We note that there is no evidence in this case of a killing in the heat of passion on sudden provocation. Therefore this issue is not "properly presented" as it was in *Mullaney*. There could not, consequently, be any *Mullaney* error prejudicial to defendant on this aspect of the case.

As a matter of state law, however, and as the jury was instructed here, our rules allocating burden of proof on self-defense and heat of passion are the same. As early as
34 1868 this Court in *State v. Willis, supra* at 29–30 said,

> "In the proof of such matters we do not recognize any distinction between the case where the question is whether the homicide is murder or manslaughter, and that where it is whether the killing is murder or excusable or justifiable homicide." There is in this case evidence of self-defense. The issue regarding its existence is properly presented. For the guidance of our trial judges, consequently, and inasmuch as there are jury instructions given here as if there were evidence of a heat of passion killing, we have discussed the matter as if such evidence were indeed present.

It is also true that the trial judge did near the beginning and at the end of his instructions tell the jury that the State had the burden to prove beyond a reasonable doubt both malice and unlawfulness. We are cognizant of the federal rule that jury instructions must be considered contextually in determining whether there is error of federal constitutional dimension. *Cupp v. Naughten*, 414 U.S. 141 (1973). Considering the entire instruction contextually we believe it must have meant this to the jury in this case: the state as a matter of abstract principle was required to prove each element of the offense charged, including malice and unlawfulness, beyond a reasonable doubt. If, however, an intentional killing with a deadly weapon was so

proved (defendant here admitted this much) a presumption arises which given in the presence of evidence of a justifiable, and hence, lawful, homicide nevertheless relieves the state of proving unlawfulness and requires the jury to find the defendant guilty unless this evidence satisfies it of the truth of defendant's contention that he did kill in self-defense.

[8] The *Mullaney* ruling does not, however, preclude all use of our traditional presumptions of malice and unlawfulness. It precludes only utilizing them in such a way as to relieve the state of the burden of proof on these elements when the issue of their existence is raised by the evidence. The presumptions themselves, standing alone, are valid and, we believe, constitutional. *State v. Williams* . . . N.C. . . ., . . . S.E. 2d . . . (1975); *State v. Sparks*, 285 N.C. 631, 207 S.E. 2d 712 (1974), pet. for cert. filed, 43 U.S.L.W. 3392 (U.S. Nov. 29, 1974) (No. 669). Neither, by reason of *Mullaney*, it is unconstitutional to make the presumptions mandatory in the absence of contrary evidence nor to permit the logical inferences arising from facts proved (killing by intentional use of deadly weapon), *State v. Williams, supra*, to remain and be weighed against con-

35 trary evidence if it is produced. The effect of making the presumptions mandatory in the absence of any contrary evidence is simply to impose upon the defendant a burden to go forward with or produce some evidence of all elements of self-defense or heat of passion on sudden provocation, or rely on such evidence as may be present in the State's case. The mandatory presumption is simply a way of stating our legal rule that in the absence of evidence of mitigating or justifying factors all killings accomplished through the intentional use of a deadly weapon are deemed to be malicious and unlawful. The prosecution need not prove malice and unlawfulness unless there is evidence in the case of their nonexistence. *Cf.* McCormick, Evidence (2d Ed. 1972) § 346, n. 91. We find this perceptive language in G. Fletcher, "Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion-Practices in Criminal Cases," 77 Yale L.J. 905 (1968) (cited in *Mullaney v. Wilbur, supra*, n. 16):

> "The critical step in the conceptual evolution of malice is *MacKally's Case*. [9 Co. Rep. 65b, 77 Eng. Rep. 828 (1611)]. That early 17th century decision, as reported and interpreted by Coke, stands for the principle that the prosecution need not prove the element of malice to convict of murder. The judges realized that malice does not lend itself to affirmative proof; by and large, the malicious killing is defined by reference to what it is not, not by what it it. As agreed by all, one type that was not malicious was a killing provoked by a sudden quarrel. Thus, to have a triable issue of malice, one had to have a triable claim that the defendant killed in the course of a sudden quarrel."

The same, we believe, may be said of the element of unlawfulness. There is no suggestion in *Mullaney* that placing such a burden of producing evidence upon a defendant violates Fourteenth Amendment Due Process. "Many States do require the defendant to show that there is 'some evidence' indicating that he acted in the heat of passion before requiring the prosecution to negate this element by providing the absence of passion beyond a reasonable doubt. (Citations omitted.) Nothing in this opinion is intended to affect that requirement." *Mullaney v. Wilbur, supra*, n. 28.

If there is evidence tending to show all elements of heat of passion on sudden provocation or self-defense the mandatory presumption of malice and unlawfulness, respectively, disappear but the logical inferences remaining from the facts

36 proved may be weighed against this evidence. In *United States v. Barnes*, 412 U.S. 837 (1973), the Supreme Court said:

> "Of course, the mere fact that there is some evidence tending to explain a defendant's possession consistent with innocence does not bar instructing the jury on the inference. The jury must weigh the explanation to determine whether it is 'satisfactory'. . . . The jury is not bound to accept or believe any particular explanation any more than it is bound to accept the correctness of the inference. But the burden of proving beyond a reasonable doubt that the defendant did have knowledge that the property was stolen, an essential element of the crime, remains on the government."

See United States v. Dube, 520 F.2d 250 (1st Cir. 1975) (Judge Campbell concurring.)

Mullaney, then, as we have interpreted it, requires our trial judges in homicide cases to follow these principles in their jury instructions: the State must bear the burden throughout the trial of proving each element of the crime charged includ-

ing, where applicable, malice and unlawfulness beyond a reasonable doubt. The decision permits the state to rely on mandatory presumptions of malice and unlawfulness upon proof beyond a reasonable doubt that the defendant intentionally inflicted a wound upon the deceased with a deadly weapon which proximately resulted in death. If, after the mandatory presumptions are raised, there is no evidence of a heat of passion killing on sudden provocation and no evidence that the killing was in self-defense, *Mullaney* permits and our law requires the jury to be instructed that defendant must be convicted of murder in the second degree. If, on the other hand, there is evidence in the case of all the elements of heat of passion on sudden provocation the mandatory presumption of malice disappears but the logical inferences from the facts proved remain in the case to be weighed against this evidence. If upon considering all the evidence, including the inferences and the evidence of heat of passion, the jury is left with a reasonable doubt as to the existence of malice it must find the defendant not guilty of murder in the second degree and should then consider whether he is guilty of manslaughter. If there is evidence in the case of all the elements of self-defense, the mandatory presumption of unlawfulness disappears but the logical inferences from the facts proved may be weighed against this evidence. If upon considering all the evidence, including the inferences and evidence of self-defense, the jury is left with a reasonable doubt as to the existence of unlawfulness it must find the defendant not guilty.

37 This case was tried November 21, 1974; *Mullaney* was decided June 9, 1975. We decline, without further guidance from the Supreme Court, to give the decision retroactive effect. We believe and hope that the Supreme Court will eventually determine that the decision applies prospectively only. If such a determination is eventually made by the Supreme Court not only would we not be required to apply its principles to the case now before us, *Kaiser v. New York*, 394 U.S. 280 (1969); *Desist v. United States*, 394 U.S. 244 (1969), it seems that it would be considered error by the Supreme Court for us to do so. In *Michigan v. Payne*, 412 U.S. 47 (1973), the Michigan Supreme Court had rejected a higher sentence imposed upon a defendant convicted after a retrial than was imposed upon his first conviction as being violative of certain due process requirements established in *North Carolina v.*

Pearce, 395 U.S. 711 (1969). The second sentence was imposed before the *Pearce* decision. In *Payne* the United States Supreme Court held that *Pearce* would not apply retroactively and it was, consequently, error for the Michigan Supreme Court to apply it to a sentencing proceeding which predated the decision although the question of the constitutionality of the higher sentence was pending before the Michigan Supreme Court when *Pearce* was decided. The judgment of the Michigan Supreme Court was reversed and the case remanded for further proceedings. *See also State v. Bullock*, 268 N.C. 560, 151 S.E. 2d 9 (1966) and *State v. Mills*, 268 N.C. 142, 150 S.E. 2d 13 (1966) where we declined to apply *Miranda v. Arizona*, 384 U.S. 436 (1966) to cases in which the trials were conducted before the decision but which were pending on appeal at the time the decision came down, on the authority of *Johnson v. New Jersey*, 384 U.S. 719 (1966).

While *Mullaney* relied heavily on *Winship* and *Winship* was held to be retroactive in *Ivan V. v. City of New York*, 407 U.S. 203 (1972), it does not necessarily follow that *Mullaney* will be given retroactive effect.

In determining whether a new rule of constitutional proportions is given retroactive effect the Supreme Court

38 seems to have considered three factors. The most important factor seems to have been the purpose to be served by the new rule. If the rule is designed to protect the reliability of the fact finding process and "the constitutional error presents a serious risk that the issue of guilt or innocence may not have been reliably determined" then it has been said that the decision will on this basis alone be given full retroactive effect. *Ivan V. v. City of New York, supra* (holding *In re Winship, supra*, retroactive); *Roberts v. Russell*, 392 U.S. 293 (1968) (holding *Bruton v. United States*, 391 U.S. 123 (1968) retroactive).

If the first factor is not determinative then the Supreme Court has considered two other factors: the extent of reliance on previous decisions, *Tehan v. United States ex rel Shott*, 382 U.S. 406 (1966), even though the new rule may have been "foreshadowed" by intervening cases, *Desist v. United States, supra* at 248, and the effect on the administration of justice of retroactive application, *Id.* at 251, not only in the nation but as a whole but within the particular jurisdictions affected. *Tehan v. United States ex rel. Shott, supra* at 418–419.

Although the first factor listed is clearly the most important, how that factor is approached by the Supreme Court seems sometimes to depend on analysis of the other two factors. *Compare Tehan v. United States ex rel. Shott, supra* (holding *Griffin v. California*, 380 U.S. 609 (1965) not retroactive), *with Stovall v. Denno*, 388 U.S. 293 (1967) (holding *United States v. Wade*, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967) not retroactive) In holding *Griffin*, which declared unconstitutional the California practice of commenting on a defendant's failure to take the stand, not to be retroactive the Supreme Court in *Tehan* recognized that, although only six states would be affected by *Griffin*, almost every trial in those six states going back many years might have to be upset if *Griffin* were made retroactive. Noting such a devastating impact on the administration of justice, the Supreme Court said:

> "Those reaping the greatest benefit from a rule compelling retroactive application of *Griffin* would be [those] under lengthy sentences imposed many years before *Griffin*. Their cases would offer the least likelihood of a successful retrial since in many, if not most, instances, witnesses and evidence are no longer available." *Tehan v. United States ex rel. Shott, supra* at 418–419.

39 *Mullaney* and *Winship* are poles apart in terms of extent of reliance on previous rules and the effect on the administration of justice of retroactive application. It seems clear that the Supreme Court saw no reliance by New York on previous rules in *Winship*. It traced almost 100 years of cases in which it had "assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required." *In re Winship*, *supra* at 362. It considered *In re Gault*, 387 U.S. 1 (1967) as an express rejection of the notion that the Due Process Clause was inapplicable to juvenile proceedings. *In re Winship, supra* at 365. *Winship*, furthermore, involved a juvenile proceeding. Its impact, consequently, on the administration of justice in New York would obviously be less than a rule which applies to all homicide cases.

The jury instructions here under attack are based upon rules which have been firmly with us for over one hundred years. Retroactive application of *Mullaney* in this State would, furthermore, have the same sort of affect, recognized in *Tehan*, as *Griffin* retroactively would have had in California and other jurisdictions. As of June 30, 1975, there were 269 inmates in

prison in this State who had been convicted of first degree murder serving sentences of life imprisonment or awaiting execution, and 728 inmates in prison having been convicted of second degree murder serving sentences ranging from two years to life. State Correctional Statistical Abstract for the Second Quarter, 1975. If *Mullaney* is to be applied retroactively new trials might have to be awarded in many cases decades old.

A number of other jurisdictions would, we believe, be similarly affected. In the following seven jurisdictions the defendant has (or had) the burden to prove by a preponderance of the evidence heat of passion on sudden provocation (or "extreme emotional distress") to reduce murder to manslaughter: *Delaware, Fuentes v. State*, 18 Crim. Law Rptr. 2153 (Del. Oct. 14, 1975); *Hawaii*, (*Mullaney* would probably affect cases in which the appeal was finally determined prior to August 27, 1971. *Compare State v. Santiago*, 53 Haw. 254, 492 P. 2d 657 (1971) *with State v. Cuevas*, 53 Haw. 110, 488 P. 2d 322 (1971)); *Maine, Mullaney v. Wilbur, supra; Maryland, Wilson v. State*, 261 Md. 551, 276 A. 2d 214 (1971); *Wilson v. State*, ... Md. App. ....., 343 A. 2d 537 (1975); *Burko v. State*, 19 Md. App. 645, 313 A 2d 864 (1974) vacated .... US. ....., 95 S.Ct. 2624 (1975); *Massachusetts, Comm. v Johnson* .... Mass. App. ....., 326 N.E. 2d 355 (1975) restating the

40 rule of *Comm. v. York*, 50 Mass (9 Met.) 93 (1845); *Cf. Comm. v. Gagne*, ... Mass. ....., 326 N.E. 2d 907, 910 (1975); *New York, People v. Balogun*, ... N.Y. 2d ....., ... N.E. 2d ....., 372 N.Y.S. 2d 384 (N. Y. Supreme Ct. Kings County 1975); *Tennessee, Hawkins v. State*, 527 S.W. 2d 157 (Tenn. App. 1975). If, as we believe, *Mullaney* prohibits requiring the defendant to prove that he acted in self-defense by a preponderance of the evidence when that issue is properly presented the following seven jurisdictions would be adversely affected: *Georgia, Chandle v. State*, 230 Ga. 574, 198 S.E. 2d 289 (1973); *See also Henderson v. State*, ... *Ga.* ....., 218 S.E. 2d 612 (1975) (citing *Mullaney*); *Ohio, State v. Poole*, 33 Ohio St. 2d 18, 294 N.E. 2d 888 (1973) (for cases prior to January 1, 1974, the effective date of Ohio Rev. Code Ann. § 2901.05 (Page 1975) which probably corrects Ohio law); *Pennsylvania, Comm. v. Cropper*, ... Pa. ....., 345 A. 2d 645 (1975) (intimating that *Mullaney* may affect Pennsylvania); *Comm. v. Carbonetto*, 455 Pa. 93, 314 A. 2d 304 (1974); *Comm. v. Winebrenner*, 439 Pa. 73, 265 A. 2d 108 (1970); *Rhode Island, State*

v. Mellow, 107 A. 871 (1919); *South Carolina, State v. Judge*, 208 S.C. 497, 38 S.E. 2d 715 (1946); *Texas, Parkman v. State*, 149 Tex. Cr. 101, 191 S.W. 2d 743 (1945) (at least in cases tried before January 1, 1974, the effective date of the new Texas Penal Code §§ 2.03, 9.02, 9.31 (Vernon 1974), which probably corrects Texas law in this respect); *West Virginia, State v. Collins*, 154 W. Va. 771, 180 S.E. 2d 54 (1971).

Retroactive application of *Mullaney* requiring retrials in homicide cases years old in at least fifteen jurisdictions would, we believe, have on the administration of justice in this country a devastating impact.

We concede that the purpose of the *Mullaney* rule, to insure a reliable determination of the question of guilt, or the degree of guilt, weighs in favor of retroactivity. Yet the Supreme Court has recognized that "the extent to which a condemned practice infects the integrity of the truth-determining process at trial is a question of probabilities." *Williams v. United States*, 401 U.S. 646, n. 7 (1971); *Stovall v. Denno, supra*. While in *Winship* there could be no question that the standard of proof employed was determinative on the issue of guilt. *In re Winship, supra*, n. 2, whether the jury instructions condemned in *Mullaney* and even more clearly those under attack here would in the final analysis be so determinative to a jury so instructed is a matter of pure speculation.

41 We note that both cases from other jurisdictions which have so far considered the question, have determined that *Mullaney* should not be given retroactive effect. *Fuentes v. State, supra* (Delaware); *People v. Balogun, supra* (New York).

For the reasons given, in the trial we find

No error.

Justice LAKE concurring in result.

It is elementary that a decision of the Supreme Court of the United States interpreting the Constitution of the United States is binding upon this Court and, although we may believe it to be erroneous, we must give it full effect in cases coming before us. It is equally elementary that a decision of a court of last resort, declaring or interpreting a rule of law, is retroactive and applies to all cases thereafter to be decided, irrespective of when they arose, unless the court which rendered that decision declares otherwise. This is more clearly true when there has been no prior conflicting decision by that court. This Court

does not have authority to declare a decision of the Supreme Court of the United States non-retroactive. In the silence of that Court on that question a decision by it, interpreting the Due Process Clause of the Fourteenth Amendment, gives to that clause the meaning so declared just as if the interpretation had been expressly written into it at the time the Amendment was ratified.

To hold, as the majority opinion does, that *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. , 44 L.Ed. 2d 508, declares that the instruction given the jury in the case now before us, violates the Due Process Clause of the Fourteenth Amendment, but that we will, nevertheless, refuse to order a new trial is for this Court to deny to this defendant his right under the United States Constitution. I agree that to give *Mullaney v. Wilbur, supra*, retroactive effect and to hold that it declares the instruction in question is contrary to the Due Process Clause of the Fourteenth Amendment would be disastrous, for such ruling would require a new trial, not only for this defendant, but for an unknown number, perhaps hundreds, of prisoners now serving sentences for murders of which this Court has held they were lawfully convicted. The practical effect would be to release most of these convicted murders upon society since loss of witnesses, due to the passage of time, would, in most in-

42 stances, prevent conviction upon a retrial. This disaster can be averted if the Supreme Court of the United States declares *Mullaney v. Wilbur, supra*, to be non-retroactive, a consummation devoutly to be desired, but this Court has no authority so to declare and, as of this date, the Supreme Court of the United States has not done so.

There is a way, however, whereby this Court can avoid this disastrous result and, in my opinion, should do so. That is to hold, as I believe is correct, that *Mullaney v. Wilbur, supra*, does not declare the instruction given to the jury by the Superior Court in Hankerson's case a violation of the Due Process Clause. If that be true, Hankerson is not entitled to a new trial and the majority opinion has reached the correct result for the wrong reason.

This is the instruction in question:

> "Under our system, when a person is charged with a crime and he pleads not guilty he does not have to prove that he is innocent, he is presumed innocent, and the *burden of proof is on the State to prove beyond a rea-*

sonable doubt that he is guilty before you can find him guilty.

* * *

"I charge that for you to find the defendant guilty of second degree murder [the crime with which Hankerson was charged and of which he stands convicted], *the State must prove two things beyond a reasonable doubt* * * * that the defendant intentionally *and without justification* or excuse and *with malice* shot Gregory Ashe with a deadly weapon. *Malice* * * * *means that condition of mind which prompts a person* to take the life of another intentionally, *or to intentionally inflict a wound with a deadly weapon upon another which proximately results in his death without just cause, excuse or justification.*

* * *

"In order to reduce the crime from second degree murder to manslaughter, *the defendant must prove* not beyond a reasonable doubt but *simply to your satisfaction* that there was no malice on his part. And in order to excuse his act altogether on the grounds of self defense, *the defendant must prove* not beyond a reasonable doubt but *simply to your satisfaction* that he acted in self defense.

43 * * * * *

"So I charge you, Ladies and Gentlemen, *if you find* from the evidence and *beyond a reasonable doubt* that on or about September 29, 1974, *the defendant*, Johnnie B. Hankerson, *intentionally and with malice* and *without justification or excuse* [i.e., not in self defense] shot Gregory Ashe with a deadly weapon, thereby proximately causing George Ashe's death, nothing else appearing, it would be your duty to return a verdict of guilty of second degree murder. *However, if you* do not so find, or *have a reasonable doubt as to one or more of these things*, you will not return a verdict of guilt of second degree murder." (Emphasis added.)

By this instruction the trial judge put squarely upon the State the burden to prove *beyond a reasonable doubt* every element of second degree murder, namely: (1) The defendant shot Ashe; (2) he thereby proximately caused Ashe's death; (3) he

shot Ashe with malice (i.e., intentionally and with a deadly weapon); (4) he shot Ashe without justification or excuse (i.e., not in self defense).

Clearly, if this were all that the jury was told, the rule of *Mullaney v. Wilbur, supra,* would be fully satisfied. But, says the majority, this is not all they were told. They were also told that to reduce the offense to manslaughter the defendant must prove *to the jury's satisfaction* he did not shoot Ashe with malice, and to excuse the killing entirely on the ground of self defense, the defendant must prove *to the jury's satisfaction* that he killed Ashe in self defense, the elements of which were correctly defined.

At first glance it seems inconsistent and contradictory to instruct the jury that the State has the burden to prove beyond a reasonable doubt the presence of malice and absence of the justification of self defense and the defendant has the burden of proving *to the satisfaction of the jury* the absence of malice or the presence of the justification of self defense. This Court has, however, held to the contrary many times, the harmonizing factor lying in the meaning of the term "to the satisfaction of the jury."

44 In *State v. Freeman*, 275 N.C. 662, 666, 170 S.E. 2d 461, Justice Sharp, now Chief Justice, speaking for a unanimous Court, said:

> "These cases [citations omitted] enunciate and reiterate the rule—established in our law for over one hundred years, *State v. Willis*, 63 N.C. 26 (1868)—that when the burden rests upon an accused to establish an affirmative defense or to rebut the presumption of malice which the evidence has raised against him, the *quantum* of proof is to the satisfaction of the jury—not by the greater weight of the evidence nor beyond a reasonable doubt—*but simply to the satisfaction of the jury.*"

In Stansbury, North Carolina Evidence (Brandis Revision), § 214, it is said that proving the presence of self defense or the absence of malice "to the satisfaction of the jury" does not require a showing "by the greater weight of the evidence."

If the defendant can satisfy this requirement by less than the "greater weight" of the evidence; that is by less persuasive, less convincing evidence than would be sufficient to tip the scales ever so slightly in his favor, how can it be said that the burden *of proof* "has been put upon him?" The burden of proof

is the *burden* to persuade the mind, to convince. A burden less than this can only be a burden to establish a reasonable, rational doubt. Thus, there is no inconsistency in telling the jury that, to convict the defendant of second degree murder, the State must prove presence of malice and absence of justification (self defense) beyond a reasonable doubt and, although the State has proved, beyond a reasonable doubt, an intentional killing with a deadly weapon, the defendant must be acquitted of that charge if he has *satisfied* the jury of the absence of malice or the presence of justification (self defense).

Admittedly, the jury cannot be expected to know what this Court has said proof "to the satisfaction of the jury" does not mean. The question is whether the jury could have been misled by what the trial judge told them in his charge *in this case*. As above stated, he clearly and unequivocally told the jury they must find the defendant not guilty of second degree murder unless the State had proved *beyond a reasonable doubt* every element of that crime, including the presence of malice and the absence of justification (self defense). In my opinion,

45 the jury which found this defendant guilty of second degree murder could not have been confused about this, and the charge of the court, which is a correct statement of the law of this State, did not in any way place upon the defendant a burden of proof forbidden by the Due Process Clause of the Fourteenth Amendment as now construed in *Mullaney v. Wilbur, supra*. I, therefore, concur in the majority's conclusion that this defendant is not entitled to a new trial.

No. 75–6568

Johnnie B. Hankerson, PETITIONER,

v.

North Carolina

ON PETITION FOR WRIT OF CERTIORARI TO the Supreme Court of the State of North Carolina.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

OCTOBER 4, 1976.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-6568

JOHNNIE B. HANKERSON,
Petitioner

v.

THE STATE OF NORTH CAROLINA,
Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Charles M. Hensey
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ATTORNEY FOR RESPONDENT

the size, age and strength of the defendant as compared to Gregory Ashe, the fierceness of the assault, if any, upon the defendant, whether or not Gregory Ashe had a weapon in his possession. And the third thing the defendant must satisfy you of is that he was not the aggressor. If he voluntarily and without provocation entered into a fight with Gregory Ashe, he was the aggressor, unless he thereafter attempted to abandon the fight and gave notice to Gregory Ashe that he was doing so. One enters a fight voluntarily if he uses towards his opponent abusive language which considering all the circumstances is calculated and intended to bring on a fight. And the fourth thing that the defendant must satisfy you of is that he did not use excessive force, that is, more force than reasonably appeared to be necessary to the defendant at the time. Again, it is for you, the jury, to determine the reasonableness of the force used by the defendant under all the circumstances as they appeared to him at the time.

If you find that the defendant acted properly in self-defense, he would not be guilty. However, if the defendant though otherwise acting in self-defense used excessive force, the defendant would be guilty of voluntary manslaughter.

In this case the defendant has introduced evidence that he is a man of good character and reputation. I won't recount all of that again for you but you will recall the witnesses who testified that the defendant was a man of good character and reputation. I want to charge you that you can consider this evidence in two ways, or you may consider it for two purposes. First, if you believe all or any part of this evidence and find that it bears upon the defendant's truthfulness, you may consider it together with all other facts or circumstances bearing upon his truthfulness in deciding whether you will believe or disbelieve his testimony at this trial. And secondly, you may consider this evidence, although good character or good reputation is not an excuse for crime, the law recognizes that a person of good character may be less likely to commit a crime than one who lacks that character. Therefore, if you believe from the evidence that the defendant has a good character, you may consider this fact in your determination of the defendant's guilt or innocence and give it such weight as you decide it should receive in connection with all of the other evidence. There is also some evidence in this case, and I won't recount all of that again for you, that the defendant some years ago has pled guilty to some other crimes. He testified that he had once been convicted of escape and once he was convicted of assault, and you will recall the things he said he had been convicted for.

I want to charge you that you may consider that evidence in one way only and that is considering the nature of the crimes which the defendant testified he had been convicted of or pled guilty to, if you think that that bears upon his truthfulness then you may take that into account in deciding whether you believe or disbelieve him as a witness. But you may not consider that evidence in determining the guilt of the defendant in this case; that is, do not find him guilty in this case because he has pled guilty to another crime or been found guilty of another crime at another time.

The State contends that the defendant ran from the scene that night or drove away from the scene that night and did not return, did not report it to the police, and the State contends that that is evidence of flight by the defendant. Evidence of flight, if you believe that evidence, may be considered by you together with all other facts and circumstances in this case in determing whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of this circumstance is not sufficient, in itself, to establish the defendant's guilt. So if you believe the evidence of flight, I want to instruct you not to find the defendant guilty on that evidence alone; you will have to consider that together with all other evidence in the case in determining whether the State has satisfied you beyond a reasonable doubt that the defendant is guilty of either of the two crimes of which you may find him guilty, if you do not find him not guilty.

COURT: Is there anything else you want charged, Mr. Rosser?
MR. ROSSER: No, sir.

So I charge you, Ladies and Gentlemen, if you find from the evidence and beyond a reasonable doubt that on or about September 29, 1974, the defendant, Johnnie B. Hankerson, intentionally and with malice and without justification or excuse, shot Gregory Ashe with a deadly weapon, thereby proximately causing Gregory Ashe's death, nothing else appearing, it would be your duty to return a verdict of guilty of second degree murder. However, if you do not so find, or have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of second degree murder.

If you do not find the defendant guilty of second degree murder, you must consider whether he is guilty of voluntary manslaughter. And if you find from the evidence beyond a reasonable doubt that on or about September 29, 1974, the defendant, Johnnie B. Hankerson, intentionally shot Gregory Ashe with a deadly weapon, thereby proximately causing Gregory Ashe's death, but are satisfied that the defendant killed without malice in the heat of sudden passion, nothing else appearing, or

used excessive force in exercising the right of self-defense, it would be your duty to return a verdict of guilty of voluntary manslaughter. However, if you do not so find, or have a reasonable doubt as to one or more of these things, you would find the defendant not guilty.

I will let you retire in just a moment. I suggest that when you do retire you appoint one of your members a foreman so that he or she could poll you in the jury room and speak for you when you return.

You will have to reach a unanimous verdict before you can find the defendant either guilty of second degree murder or manslaughter or not guilty.

If you want any further instructions, you are entitled to have them. However, you will all have to come back to the courtroom to get them; you can't send one person back to get them for you and you can't get the deputy sheriff to get them for you.

So at this time I instruct you, Ladies and Gentlemen, to retire to your room and render a true and just verdict.

(JURY RETIRES AT 3:43 O'CLOCK P.M.)

(JURY RETURNS TO THE COURTROOM FOR FURTHER INSTRUCTIONS AT 4:32 O'CLOCK P.M. AND THE FOLLOWING PROCEEDINGS ARE HAD.)

CLERK: Ladies and Gentlemen of the Jury, have you agreed upon your verdict?

JURY FOREMAN: No. We would like to have the Judge to clarify again the difference between manslaughter and second degree murder.

COURT: All right. Excuse me. I thought you had reached a verdict. Second degree murder is the intentional killing without justification or excuse and with malice. Voluntary manslaughter is the intentional killing without justification and excuse and without malice. In other words, the difference between second degree murder and manslaughter is the absence of malice in manslaughter. I defined malice for you. I will be glad to define it for you again if you want me to. Also, I want to instruct you that the charge I gave you as to self-defense would apply equally to manslaughter as it would to second degree murder in that if you find the defendant was justified or excused in the killing because he was acting in self-defense then you would find him not guilty as to either one. I explained to you a little bit more maybe than you asked, but I thought you needed that clarified, perhaps. Is that enough explanation or would you like further explanation? Well, I will define malice for you. The difference between second degree murder and manslaughter, as I told you, is that it is not necessary for the State to prove malice in order for you to find him guilty of manslaughter. As I told you before, malice is not only hatred, ill-will or spite, as it is ordinarily understood, to be sure

that is malice, but it also means that condition of mind which prompts a person to take the life of another intentionally, or to intentionally inflict a wound with a deadly weapon upon another which proximately causes his death without just cause, excuse or justification. That is the legal definition of malice.

Unless you want further instructions, I will let you retire and resume your deliberations. If you want any further instructions, don't hesitate to come out and ask for them."

ARGUMENT

I

(A) NORETROACTIVITY

(1) In General

The Petitioner argues, in substence, in Sections I and II of his petition that the Supreme Court of North Carolina, by declining to give this Court's decision in Mullaney v. Wilber, 421 U.S. 684 (1975), retroactive effect was in error. He argues that the Mullaney rule as to the burden of proof in criminal trials affects the reliability of the fact finding process to such an extent that general retroactive application of the rule is required. Finally, as an absolute minimum, he contends the rule should be given limited retroactivily to his case since it was currently pending on direct appellate review at the time Mullaney was announced and that the reviewing Court failed to consider this alternative.

The problem of whether to apply a "new" doctrine of constitutional law retroactively or prospectively has been the subject of intense debate, over the past eleven years, since the decision in Linkletter v. Walker, 381 U.S. 618 (1965).

In this interval, some twenty-three cases have announced "new" constitutional doctrines to be applied in criminal prosecutions and approximately one-half (twelve) of these "new" doctrines have, in subsequent cases, been held to be fully retroactive. Full retroactivity has been given in the following cases:

Griffin v. Illinois, 351 U.S. 12 (1956), right of indigent defendant to transcript on appeal;

Hamilton v. Alabama, 368 U.S. 52 (1961), right to counsel at arraignment plea;

Douglas v. California, 372 U.S. 353 (1963), right to assistance of counsel on appeal;

Gideon v. Wainwright, 372 U.S. 335 (1963), right to assistance of counsel at Felony trial;

White v. Maryland, 373 U.S. 59 (1963), prohibition of guilty plea taken without assistance of counsel;

Jackson v. Denno, 378 U.S. 368 (1964), procedure to determine voluntary confession;

Mempa v. Rhay, 389 U.S. 128 (1967), right to counsel at probation hearing;

Barber v. Page, 390 U.S. 719 (1968), right to confrontation during trial;

Bruton v. United States, 391 U.S. 123 (1968), prohibition of use of confession by codefendant implicating defendant;

Witherspoon v. Illinois, 391 U.S. 510 (1968), disqualification of death penalty inclined jurors;

In Re Winship , 397 U.S. 358 (1970), burden of proof beyond a reasonable doubt required in juvenile proceeding where accused would essentially be convicted of a crime and Waller v. Florida, 397 U.S. 387 (1970), double jeopardy applies in State and municipal prosecution on same act or offense. New doctrines which have been held to be nonretroactive;

Map v. Ohio, 367 U.S. 643 (1961), limitations on use of illegally obtained evidence;

Escobedo v. Illinois, 378 U.S. 478 (1964), right to counsel at police interrogation before trial;

Griffin v. California, 380 U.S. 609 (1965), prosecution's comment on defendant's failure to testify;

Miranda v. Arizona, 384 U.S. 436 (1966), right to be warned by interrogating police officers prior to trial;

United States v. Wade, 388 U.S. 218 (1967), right to counsel at pretrial lineups;

Katz v. United States, 389 U.S. 347 (1967), electronic eavesdropping;

Duncan v. Louisiana, 391 U.S. 145 (1968), right to jury trial;

Lee v. Florida, 392 U.S. 378 (1968), use of wiretap evidence at trial;

Boykin v. Alabama, 395 U.S. 238 (1969), form of guilty plea;

Chimel v. California, 395 U.S. 752 (1969), scope of search incident to lawful arrest and Coleman v. Alabama, 399 U.S. 1 (1970), right to counsel at preliminary hearing.

It would appear that most, if not all, of the decisions held to be retroactive involved new doctrines which would, it was believed, correct difficiencies in the fact finding procedure in use prior thereto. On the other hand, new constitutional doctrines designed to deter interlorrable police conduct (illegal search, seizures and unreasonable or appressive investigatory techniques) or to guarantee early appointment of counsel or limit to the scope of jury arguments have been held to be nonretroactive.

In all of the cases, as put by one writer:

> "...the Supreme Court has indicated that the following are the criteria for determining the retroactivity of its new rules: (1) the purpose to be served by the particular new rule; (2) the extent of reliance which had been placed upon the old rule; and (3) the effect on the administration of justice of a retroactive application of the new rule."

Annotation, 22 L. Ed. 2d 821, 832 (1970). The decided cases support this statement. Tehan v. United States , 382 U.S. 406 (1966), reh. den. 383 U.S. 931 (1966); Stovall v. Denno, 388 U.S. 293 (1967); De Stefano v. Woods, 392 U.S. 631 (1968), reh. den. 393 U.S. 898 (1968); Desist v. United States, 394 U.S. 244 (1969), reh. den. 395 U.S. 931 (1969); Halliday v. United States, 394 U.S. 831 (1969); Williams v. United States, 401 U.S. 646 (1971); Adams v. Illinois, 405 U.S. 278 (1972) and Ivan V. v. City of New York, 407 U.S. 203 (1972). In its opinion, the Supreme Court of North Carolina recognized this when it noted:

> "In determining whether a new rule of constitutional proportions is given retroactive effect the Supreme Court seems to have considered three factors. The most important factor seems to have been the purpose to be served by the new rule. If the new rule is designed to protect the reliability of the fact finding process and 'the constitutional error presents a serious risk that the issue of guilt or innocence may not have been reliably determined' then it has been said that the decision will on this basis alone be given full retroactive effect. (Citations omitted.)
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> ***
>
> "If the first factor is not determinative then the Supreme Court has considered two other factors: the extent of reliance on previous decisions...even though the new rule may have been 'foreshadowed' by

> intervening cases...and the effect on the administration of justice of retroactive application...not only in the nation but (sic) as a whole but within the particular jurisdiction affected." 288 N.C. at pages 652 and 653.

The State of North Carolina submits that the decision of its Supreme Court was entirely consistent with the tests as set forth above and, accordingly, no error in this aspect of its opinion appears. An in depth analysis and argument relating to these three factors, as they apply to the North Carolina rules in general and this case in particular, follows.

(2) The "Purpose" Factor

As both this court and the North Carolina Supreme Court have recognized, the purpose of a rule which is deemed to improve the reliability of the fact finding process will be given the greatest weight in the retroactivity consideration. When it is concluded a new doctrine will improve the fact finding process, it will be given retroactive effect because it may disclose that an otherwise innocent person was convicted in the past because the fact finding process was unreliable.

It is submitted that the rules of law as to the burden of proof as they existed in North Carolina prior to this case did not affect the reliability of the fact finding process to such an extent as to require the retroactive application of Mullaney.

The record in this case shows the trial court instructed the jury in pertinent part, as follows:

> "Under our system, when a person is charged with a crime and he pleads not guilty he does not have to prove that he is innocent, he is presumed to be innocent, and the burden of proof is on the State to prove beyond a reasonable doubt that he is guilty before you can find him guilty.
>
> "When I speak of a reasonable doubt I don't mean a vain, a fanciful or an imaginary doubt, but I do mean a sane or a rational doubt . . . . (I)f you have any doubt based on reason and common sense, arising out of some or all the evidence that has been presented, or lack of evidence as the case may be, as to any fact necessary to constitute the guilt of the defendant, then you would have a reasonable doubt, and it would be your duty to give the defendant the benefit of that doubt and find him not guilty.
>
> ***
>
> "I charge that for you to find the defendant guilty of second degree murder, the State must prove two things beyond a reasonable doubt, first, that the defendant intentionally and without justification or excuse and with malice shot Gregory Ashe with a deadly weapon. Malice is not only hatred, ill-will or spite, as it is ordinarily understood, to be sure that is malice, but it always (also) means that condition of mind which prompts a person to take the life of another intentionally, or to intentionally inflict a wound with a deadly weapon upon another which proximately results in his death without just cause, excuse or justification. A pistol, a .38 caliber pistol, a pistol would be a deadly weapon. The second thing the State must prove and prove to you beyond a reasonable doubt is that the shooting was the proximate cause of Gregory Ashe's death . . . .
>
> "If the State proves beyond a reasonable doubt or it is admitted that the defendant intentionally killed Gregory Ashe with a deadly weapon, or intentionally inflicted a wound upon Gregory Ashe with a deadly weapon, that proximately caused his death, the law raises two presumptions; first, that the killing was unlawful, and second, that it was done with malice. Then, nothing else appearing, the defendant would be guilty of second degree murder . . . .
>
> "As I told you, you will have to either find the defendant guilty of second degree murder or manslaughter or not guilty. In order to reduce the crime from second degree murder to manslaughter, the defendant must prove not beyond a reasonable doubt but simply to your satisfaction that there was no malice on his part. And in order to excuse his act altogether on the grounds of self-defense, the defendant must prove not beyond a reasonable doubt but simply to your satisfaction that he acted in self-defense. And I will charge you on self-defense in just a moment. But I do want to charge you that to negate malice and thereby reduce the crime to manslaughter, the defendant must satisfy you of three things: first, that he shot Gregory Ashe in the heat of a passion . . . . The second thing he must satisfy you of is that this passion was provoked by acts of Gregory Ashe which the law regards as adequate provocation . . . . And thirdly, that the shooting took place so soon after the provocation that the passion of a person of average mind and disposition would not have cooled.
>
> "To excuse the killing entirely on the grounds of self-defense . . . the defendant must satisfy you of four things: first, that it appeared to the defendant and he believed it to be necessary to shoot Gregory Ashe in order to save himself from death or great bodily harm . . . . The second thing that you must be satisfied of--excuse me--that the defendant must satisfy you of is this, that the circumstances as they appeared to him at the time were sufficient to create such belief in the mind of a person of ordinary firmness . . . . And the third thing the defendant must satisfy you of is that he was not the aggressor . . . . And the fourth thing that the defendant must satisfy you of is that he did not use excessive force . . . .

"If you find that the defendant acted properly in self-defense, he would not be guilty. However, if the defendant though otherwise acting in self-defense used excessive force, the defendant would be guilty of voluntary manslaughter.

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"So I charge you, Ladies and Gentlemen, if you find from the evidence and beyond a reasonable doubt that on or about September 29, 1974, the defendant, Johnnie B. Hankerson, intentionally and with malice and without justification or excuse, shot Gregory Ashe with a deadly weapon, thereby proximately causing Gregory Ashe's death, nothing else appearing, it would be your duty to return a verdict of guilty of second degree murder. However, if you do not so find, or have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of second degree murder.

"If you do not find the defendant guilty of second degree murder, you must consider whether he is guilty of voluntary manslaughter. And if you find from the evidence beyond a reasonable doubt that on or about September 29, 1974, the defendant, Johnnie B. Handerson, intentionally shot Gregory Ashe with a deadly weapon, thereby proximately causing Gregory Ashe's death, but are satisfied that the defendant killed without malice in the heat of sudden passion, nothing else appearing, or used excessive force in exercising the right of self-defense, it would be your duty to return a verdict of guilty of voluntary manslaughter. However, if you do not so find, or have a reasonable doubt as to one or more of these things, you would find the defendant not guilty." (Emphasis supplied.)

After the jury retired and came back for reinstruction the judge told them:

> "Second degree murder is the intentional killing without justification or excuse and with malice. Voluntary manslaughter is the intentional killing without justification and excuse and without malice. In other words, the difference between second degree murder and manslaughter is the absence of malice in manslaughter. I defined malice for you. I will be glad to define it for you again if you want me to. Also, I want to instruct you that the charge I gave you as to self-defense would apply equally to manslaughter as it would to second degree murder in that if you find the defendant was justified or excused in the killing because he was acting in self-defense then you would find him not guilty as to either one . . . .
>
> Well, I will define malice for you. The difference between second degree murder and manslaughter, as I told you, is that it is not necessary for the State to prove malice in order for you to find him guilty of manslaughter. As I told you before, malice is not only hatred, ill-will or spite, as it is ordinarily understood, to be sure that is malice, but it also means that condition of mind which prompts a person to take the life of another intentionally, or to intentionally inflict a wound

> with a deadly weapon upon another which proximately causes his death without just cause, excuse or justification. That is the legal definition of malice." (Emphases supplied.)

The question then becomes did these instructions, by telling the jury that it must be satisfied that the petitioner acted in the heat of passion on sudden provocation or in self-defense, impermissibly relieve the prosecution of its burden of proving malice and unlawfulness and place this burden of persuasion as to the non existence of these elements on the petitioner so as to substantially impair the fact finding process. To resolve this question, an examination of what is meant by telling the jury, in accordance with the long settled North Carolina rule, that it must be satisfied is required.

This language as used in the instructions given here does not mean the jury must be persuaded by a preponderance of the evidence that malice does not exist, that the heat of passion on sudden provocation does exist, or that the elements of self-defense do exist. The Maine jury instructions found wanting in Mullaney clearly placed upon the defendant the burden to show that it is more probable than not, or by a fair preponderance of the evidence, that the defendant killed in the heat of a sudden passion. Maine followed the landmark case of Commonwealth v. York, 9 Met (50 Mass.) 93 (1845). This Court seems to have regarded this aspect of the Maine jury instruction as being primarily offensive when it observed:

> "Under this burden of proof a defendant can be given a life sentence when the evidence indicates that it is as likely as not that he deserves a significantly lesser sentence. This is an intolerable result . . . ." Mullaney v. Wilbur, supra at 703.

The North Carolina burden of proof on a defendant to show heat of passion or self-defense is decidedly and purposely different in that the quantum of proof is simply to the "satisfaction" of the jury--not by the greater weight of the evidence nor beyond a reasonable doubt. State v. Freeman, 275 N.C. 662, 170 S.E. 2d 461 (1969). This standard was not invented by North Carolina. It was standard recognized by expositors of the common law:

> "(W)e may take it for a general rule that all homicide is malicious, and of course amounts to murder, unless where justified by the command or permission of the law; excused on the account of accident or self-preservation; or alleviated into manslaughter, by being either the involuntary consequence of some act, not strictly

lawful, or (if voluntary) occasioned by some sudden and sufficiently violent provocation. And all these circumstances of justification, excuse, or alleviation, it is incumbent upon the prisoner to make out, to the satisfaction of the court and jury (Emphasis supplied): the latter of whom are to decide whether the circumstances alleged are proved to have actually existed; the former, how far they extend to take away or mitigate guilt. For all homicide is presumed to be malicious, until the contrary appeareth upon evidence." 4 W. Blackstone Commentaries *201. Excerpts cited in Mullaney v. Wilbur, supra at 693.

But see Woolmington v. Dir. of Public Prosecutions, 1935 Ap. Cas. 462, cited in Mullaney v. Wilbur, supra at n. 22.

As noted in Mullaney,

"In a landmark case, Commonwealth v. York, 9 Met (50 Mass) 93 (1845) Chief Justice Shaw of the Massachusetts Supreme Judicial Court held that the defendant was required to negate malice aforethought by proving by a preponderance of the evidence that he acted in the heat of passion." 421 U.S. at 694.

This Court rejected York's rule for use in federal courts in Davis v. United States, 160 U.S. 469 (1895), giving this reason:

"We are unable to assent to the doctrine that in a prosecution for murder, the defense being insanity, and the fact of the killing with a deadly weapon being clearly established it is the duty of the jury to convict where the evidence is equally balanced on the issue as to the insanity of the accused at the time of the killing." 160 U.S. at 484. (Emphasis supplied.)

This was precisely the reason given 80 years later in Mullaney.

North Carolina has never followed York; rather, proceeding along the lines of the dissent in York and the later case of Commonwealth v. Hawkins, 3 Gray (69 Mass.) 463 (1855). In State v. Ellick, 60 N.C. 450 (1864) it was held that a defendant need not make out his affirmative defense or matters in mitigation beyond a reasonable doubt but simply to the satisfaction of the jury. In State v. Willis, 63 N.C. 26 (1868) the North Carolina Court considered York and explicitly rejected that portion of the York opinion which placed the burden on the defendant to make out his affirmative defense or matters in mitigation by a preponderance of the evidence, noting:

"We prefer to stand super antiquas vias, and to adhere to the rules laid down in the State v. Ellick, above referred to. In that case the erroneous statement which we had inadvertently made in the State v. Peter Johnson, (48 N.C. 266 (1855)) that it was incumbent on the prisoner to establish the matters of excuse or extenuation

beyond a reasonable doubt, is corrected. In it is also corrected what we consider as erroneous in the decision of the Court in Commonwealth v. York, that the matters of excuse or extenuation which the prisoner is to prove, must be decided according to the preponderance of evidence. It is more correct to say, as we think, that they must be proved to the satisfaction of the jury." 63 N.C. at 29.

Although there has been language in several of the later North Carolina cases to the contrary, Stansbury's North Carolina Evidence § 214, n. 48 (Brandis Rev. 1973), e.g., State v. Freeman, supra, it has held that the burden on the defendant is not by the preponderance of the evidence, State v. Barrett, 132 N.C. 1005, 43 S.E. 832 (1903), nor any greater standard, State v. Freeman, supra. State v. Carland, 90 N.C. 668 (1884), holding to the contrary, erroneously purported to follow Willis and was overruled sub silentio in State v. Barrett, supra.

In Barrett the judge's instruction on burden of proof was basically that used in Maine. Although reversing for other errors, this aspect of the charge was strongly criticized as not in accord with prior cases, the court saying:

"(T)he prisoner must satisfy the jury, neither by a reasonable doubt nor yet by a preponderance of the evidence, but simply satisfy them, of the existence of facts and circumstances which mitigate the offense or which make good a plea of self-defense."

"Satisfying" the jury of the existence of certain facts therefore does not mean that defendant must prove their existence by a preponderance of the evidence.

Accordingly, the crucial difference between the jury instructions given here and those given in Maine which were struck down in Mullaney are: upon proof beyond a reasonable doubt of an assault with a deadly weapon resulting in death, and the unlawfulness of the killing, and evidence of all elements of heat of passion on sudden provocation a jury under the Maine instructions would be required to return a verdict of guilty of murder unless it could find affirmatively by a preponderance of the evidence that the killing was done in the heat of passion on sudden provocation; whereas under the approved instructions in North Carolina even if no such affirmative finding was made the jury could not return a verdict of guilty of murder in the second degree unless the State, aided by the inference of malice arising from the use of a deadly weapon, proved malice

beyond a reasonable doubt. Thus it can be concluded that the defendant's burdern to "satisfy" the jury of the existence of heat of passion taken in the context of the entire instruction means only that the evidence of heat of passion on sudden provocation must be sufficient to raise a reasonable doubt in the minds of the jury as to the existence of malice. This conclusion is required in order to give appropriate effect to those portions of the instructions which unequivocally and repeatedly place upon the State the burden to prove malice beyond a reasonable doubt. Likewise inasmuch as the State here was required to prove the absence of justification or excuse, i.e., unlawfulness beyond a reasonable doubt, the defendant's burden to "satisfy" the jury of the existence of self-defense means only that the evidence of self-defense must be sufficient to raise a reasonable doubt as to the existence of unlawfulness.

While the terminology of these instructions as interpreted above may allocate some burden of persuasion to defendant it does not follow that the allocated burden is therefore constitutionally impermissible. This Court recognized in Mullaney v. Wilbur, supra, n. 20, that the North Carolina rules have "blurred the distinction between" the production burden and the persuasion burden. Any so called blurring does not arise from failure to recognize the difference between producing evidence and persuading the jury but rather from the constitutional insignificance of the distinction between requiring a defendant to produce evidence which is capable of belief by a jury and which tends toward innocence or mitigation (tacitly approved in Mullaney), and requiring him to persuade a jury that there is a "doubt based on reason and common sense arising out of some or all of the evidence that has been presented, or lack of evidence as the case may be, as to any fact necessary to constitute (his) guilt."

While there may be words in the instruction such as "if you find that the defendant acted . . . in self-defense, he would not be guilty" and "the defendant must satisfy you" which, isolated, might seem to place some burden of proving affirmatively the presence of self-defense or heat of passion, when placed in contex of other pertinent provisions of the instructions, they do not. See Cupp v. Naughten, 414 U.S. 141 (1973). Cupp arose from an Oregon criminal

prosecution in which the defendant put on no evidence. Twice the court charged that the defendant was presumed innocent until proven guilty beyond a reasonable doubt. The judge also charged on an Oregon permissive inference that witnesses were presumed to speak the truth. Defendant claimed this latter instruction impinged unconstitutionally on the presumption of innocence and the prosecution's burden of proof beyond a reasonable doubt. In rejecting the claim this Court said:

> "Certainly the instruction by its language neither shifts the burden of proof nor negates the presumption of innocence accorded under Oregon law. It would be possible perhaps as a matter of abstract logic to contend that any instruction suggesting that the jury should believe the testimony of a witness might in some tangential respect 'impinge' upon the right of the defendant to have his guilt proved beyond a reasonable doubt. But instructions bearing on the burden of proof, just as those bearing on the weight to be accorded different types of testimony and other familiar subjects of jury instructions, are in one way or another designed to get the jury off dead center and to give it some guidance by which to evaluate the frequently confusing and conflicting testimony which it has heard. The well-recognized and long-established function of the trial judge to assist the jury by such instructions is not emasculated by such abstract and conjectural emanations from Winship." Id. at 148-149.

So in this case, even if those challenged portions of the instruction, in isolation, may "as a matter of abstract logic . . . impinge on the right of the defendant to have his guilt proved beyond a reasonable doubt," taken in context of the full charge they are designed simply, and constitutionally, to guide the jury in evaluating whether the State has proven guilt beyond a reasonable doubt.

Not only do these instructions comport with the Due Process Clause of the Fourteenth Amendment, they also enunciate principles that are supported by compelling policy considerations. The reasonable doubt standard in criminal cases is erected in favor of the life and liberty of innocent defendants. To place no burden on a criminal defendant charged with homicide to raise even a reasonable doubt as to the existence of malice or unlawfulness upon proof that he intentionally shot another person which shooting proximately resulted in that person's death would be to favor death to the victim

and injustice to the State. This is so because a homicide victim can never himself shed light on the circumstances surrounding the killing. One can think of no rule which would more inevitably lead to undersirable results than one which requires instructing a jury that it must acquit a homicide defendant who produces some evidence of mitigation or justification whether or not that evidence is enough or "satisfies" it that there is a reasonable doubt as to malice or unlawfulness. Giving the defendant the burden of raising a reasonable doubt is an approved rule in a number of jurisdictions. DeGrott v. United States, 78 F2d, 244, 251 (9th Cir. 1935) (synthesizing Davis v. United States, supra, and Matheson v. United States, 227 U.S. 540 (1913)); Spence v. Territory, 13 Ariz. 20, 108 P. 227 (1910); Everett v. State, 88 Ariz 293, 356 P. 2d 394 (1960); State v. Dill, 282 S.W. 2d 456 (Mo. 1955); State v. Harrison, 81 N.M. 623, 471 P. 2d 193 (Ct. App. 1970); State v. Hazlet, 16 N.D. 426, 113 N.W. 374 (1907); see annot., 43 A.L.R. 3d 221 (1972), especially §§ 3(f) and 4(b).

Assuming the above analysis is correct, then there has been no undue impairment of the reliability of the fact finding process in North Carolina. Juries have always been told the burden is on the State to prove every element of the crime beyond a reasonable doubt and the State has always carried this burden in every case where conviction has resulted. The finder of fact has had only one standard to apply; namely, proof beyond a reasonable doubt. This situation is clearly different from that presented in In re Winship, supra where the fact finder (the juvenile court judge) stated that if the reasonable doubt standard applied he would acquit. The fact finder in Winship never had the beyond a reasonable doubt standard to apply to any of the elements of the alleged offense. Such is not the case here where the only standard to be applied by the fact finder was beyond a reasonable doubt and this burden was never shifted.

In summary, the State submits that when the "probabilities" of the impact of the instruction under attack are weighed on the fact finding process, which can be done under Williams v. United States, 401 U.S. 646 (1971), there is little likelihood the fact finding process in the many former trials was so unreliable as to require a retroactive

application of the Mullaney rule. This being so, the Supreme Court of North Carolina was entirely correct in refusing to apply this new doctrine retroactively.

(3) The Reliance Factor

The Respondent argues that because of the long reliance on its well-settled law the impact of an ultimate holding of retroactivity would be great indeed. Because the Supreme Court of North Carolina fully developed the long history of its doctrine of proof to the satisfaction of the jury in its opinion, see 288 N.C. pages 644 through 648, this excellent account will not be repeated here except to emphasize, as noted in the "Purpose" argument proceeding, that this doctrine had its origins in the common law before North Carolina even became a State. Moreover, the North Carolina Supreme Court as to self defense has never taken the position of Deleware, Maryland, Ohio, Pennsylvania, Rhode Island, Maine and West Virginia which require proof by a preponderance of the evidence, or South Carolina which requires proof by the greater weight of the evidence, or Kentucky which requires proof by convincing evidence. Annotation, 43 A.L.R. 3rd 221 (1972). It appears that Georgia was the only other state with a standard similar to North Carolina. See, e.g., Mullis v. State, 196 Ga. 569, 27 S.E. 2d 91 (1943). Aside from North Carolina the retroactive impact of this new doctrine on other states would be as great, or perhaps greater than, on North Carolina. For example, Maryland has already held it applicable to its law which was similar to Maine's in Evans v. State, 28 Md. App. 640, 349 A. 2d 300 (1975). Maryland has further held Mullaney to be completely retroactive but, as noted hereafter, its court feels complete retroactivity will have only a limited effect in overturning prior convictions. New York, while holding complete retroactivity also, has nevertheless found its law to be in harmony with the new standards and, consequently, expects no upsetting of its prior convictions. People v. Patterson, 19 Crim. Law Rptr. 1001 (N.Y. April 1, 1976). Deleware has declined to apply the rule retroactively but, on a prospective basis, did require changes in some of its law. Fuentes v. State, 18 Crim. Law Rptr. 2153 (Del. Oct. 14, 1975). So far, the lower federal courts have also split on the question. See

Hallowell v. Keve, 19 Crim. Law Rptr. 2145 (U.S. Dist. Del. April 22, 1976); Castro v. Regan, 18 Crim Law. Rptr. 224 (3rd Cir.) None of these cases, however, settle the question because only this court can make an authoritative determination as to retroactivity.

Before noting the specific impact on North Carolina, it should be noted there was no "foreshadowing" of the Mullaney doctrine in any prior decisions so as to weaken the reliance on past rules. As noted previously In re Winship, supra and Ivan V. v. City of New York, supra, merely applied the long standing rules of proof of guilt beyond a reasonable doubt to juvenile proceedings where a finding of delinquency was based on proof of a crime. Winship merely said that to convict a juvenile of what would otherwise be a crime, evidence beyond a reasonable doubt would be required rather than proof by a mere preponderence of the evidence. In neither of these cases, both of which involved juvenile proceedings in New York, was the issue of either mitigation or self-defense present. (Although this court rejected this type of distinction by petitioner in his argument that Winship did not control. Mullaney v. Wilbur, supra at page 697. Thus, if Mullaney is merely retroactive extension of Winship, then Winship did "foreshadow" the new rules.) However, as best the Respondent can glean from Mullaney, such was not the case.

The decisions of the lower Federal Courts in the protracted litigation involving Mr. Wilbur did not "foreshadow" the result ultimately reached in his case. Thus, in the first two cases in the Federal District Court and the Court of Appeals for the First Circuit, Wilbur v. Robbins, 349 F. Supp. 149 (1972) and Wilbur v. Mullaney, 473 F. 2d 943 (lst. Cir 1973) turned on an interpretation of Maine law and equated malice aforethought with premeditation, holding Winship to require the prosecution to prove this fact beyond a reasonable doubt. This had always been the law in North Carolina as shown by the analysis in the "Purpose" section of this brief and as further elaborated in the Presumption section ante. After a reintrepretation of the Maine law in State v. Lafferty, 309 A. 2d 647 (1973), this court directed the First Circuit to reconsider its ruling. Mullaney v. Wilbur, 414 U.S. 1139 (1974). In its reconsideration, the Court of Appeals for the First Circuit held the principles of Winship applied and that to establish murder

the prosecution must prove beyond a reasonable doubt that the defendant did not act in the heat of passion. Wilbur v. Mullaney, 496 F. 2d 1303 (1974). Thus, until late 1974, never had any Federal court decision "foreshadowed" this new doctrine. Several other cases of this Court had considered the problem in the context of Federal law, Davis v. United States, supra, but refused to apply the doctrine to the States. Leland v. Oregon, 343 U.S. 790 (1952).

Almost from the time it became a State and certainly for over one hundred years the instructions under attack were regarded as correct by all who administered criminal justice in North Carolina. To change these rules retroactively would destroy the justified reliance on the heretofore settled and unquestioned law with the consequent great impact noted below.

(4) The Impact Factor

In addition to the impact of a decision which would retroactively nullify over one hundred years of settled law in North Carolina and number of other States, the reliance by North Carolina on its longstanding rules has been equally great. It cannot be denied that retroactive application of this new doctrine both to North Carolina and the other States will result in literally thousands of State post conviction hearings or Federal haebus corpus hearings.

In North Carolina alone, as noted by the Supreme Court of North Carolina in its opinion, there are around one thousand individuals currently incarcerated in the prison system whose trials might be erroneous if the Mullaney doctrine is applied retroactively. 288 N.C. at page 654. (The Maryland Court in Evans v. State, supra, in an exhaustive analysis, says that ultimately only a few convictions will be overturned because of the limited number of cases where a Mullaney error will be found to be prejudical. This overlooks the simple fact that virtually every prisoner convicted of homicide will want his trial reexamined, a tremendous undertaking!) To relitigate these stale convictions, with the burden and expense of locating the records of the proceedings (if, indeed, records of the older trials even exist), would be an extremely expensive process. An inordinate amount of prosecutorial and judicial time would be spent on litigation all believed had long since ended. Surely this time, money

and energy would be better spent dealing with today's crowded dockets and rising criminalty rather than on a rehashing of trials long thought to be in a state of repose.

No civilized government wants a system of criminal justice which convicts the innocent. North Carolina submits that its system of criminal justice and the trials conducted thereunder produced results which were as reliable as any. Because of the years of reliance upon these rules by the people who enforce, administer and apply the rules of law formulated, these rules, as they existed prior to June 9, 1975, should be allowed to stand. Any other result, the Respondent submits, would create chaos and havoc unwarranted by the benefits sought to be obtained. The duty of the Courts, the Respondent argues, is to end litigation; retroactivity would create litigation which is an undesirable result.

(5) Limited Retroactivity

The petitioner's argument for limited retroactivity as to him because his case was still on direct review is not well taken. The petitioner relies heavily on Linkletter v. Walker, 381 U.S. 618 (1965) and United States v. Schooner Peggy, 1 Cranch 103 (1801) and asserts the Supreme Court of North Carolina did not consider this alternative in its opinion.

The opinion of the Supreme Court of North Carolina refutes this assertion. In 288 N.C. at page 652, the opinion noted:

> "This case was tried November 21, 1974; Mullaney was decided June 9, 1975. We decline, without further guidance from the Supreme Court, to give the decision retroactive effect. We believe and hope that the Supreme Court will eventually determine that the decision applies prospectively only. If such a determination is eventually made by the Supreme Court not only would we be not required to apply its principles to the case now before us, Kaiser v. New York, 394 U.S. 280 (1969); Desist v. United States; 394 U.S. 244 (1969), it seems that it would be considered error by the Supreme Court for us to do so." (Emphasis added.)

Earlier, it is opinion, the court was careful to note:

> "We decline, however, for reasons hereinafter stated, to give Mullaney retroactive effect in North Carolina. We hold that

> because the trial judge instructed the jury in accordance with our law of homicide as it stood, and in a trial conducted, before the Mullaney decision, the defendant is not entitled to the benefit of the Mullaney doctrine. We will, however, apply the decision to all trials conducted on or after June 9, 1975." 288 N.C. at page 643.

Accordingly, this alternative was considered and rejected by the Court.

Moreover, the later cases of this Court have firmly rejected any notions of limited retroactivity considered in Linkletter and Schooner Peggy. Johnson v. New Jersey, 384 U.S. 719 (1966). In appropriate cases, new rules have been applied in an entirely prospective manner even in the case where they were announced. England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964); James v. United States, 366 U.S. 213 (1961). Johnson, supra, by its very terms limited the rules announced in Escobedo v. Illinois, supra, and Miranda v. Arizona, supra, to trials began after the date of these decisions and cut off application of these rules to any cases still on direct appeal. Based on these cases, therefore, the Supreme Court of North Carolina was entirely correct as to this aspect of the case. Obviously, if it should later be determined the decision is fully retroactive, then this conclusion would be incorrect for that it is premised on an ultimate determination of nonretroactivity; it was on this premise, of course, that the North Carolina Court based its determination. Nothing to date, however, compels the result argued for by the petitioner in this aspect of his petition.

(B) EVIDENTARY PRESUMPTIONS (INFERENCES)

Petitioner asserts that he was denied due process of law by the instruction that the law raises presumptions of unlawfulness and malice from proof beyond a reasonable doubt of an intentional killing with a deadly weapon or of an intentional infliction of a wound with a deadly weapon proximately causing death. A similiar contention was rejected by the North Carolina Court in State v. Sparks, 285 N.C. 631, 207 S.E. 2d 712 (1974), petition for cert. filed 43 U.S.L.W. 3392 (U.S. Nov. 29, 1974) (No. 669). Defendant contends that the intervening decision in Mullaney compels a contrary decision.

Because of the Maine law of homicide, this Court in Mullaney, was not called upon to deal with the constitutionality of evidentiary presumptions and did not do so. This law and the precise issue it presented was succinctly stated by this Court itself, relying on State v. Lafferty, 309 A2d 647 (Me. 1973), as follows:

> "Absent justification or excuse, all intentional or criminally reckless killings are felonious homicides. Felonious homicide is punished as murder--i.e., by life imprisonment--unless the defendant proves by a fair preponderance of the evidence that it was committed in the heat of passion on sudden provocation, in which case it is punished as manslaughter--i.e., by a fine not to exceed $1,000 or by imprisonment not to exceed 20 years. The issue is whether the Maine rule requiring the defendant to prove that he acted in the heat of passion on sudden provocation accords with due process." 421 U.S. at 691. (Emphasis supplied.)

To prove murder the State in Maine was required to prove only (1) that the killing was unlawful, i.e., without justification or excuse and (2) that it was intentional. Malice, or malice aforethought, was not an essential element of the crime of murder in Maine. State v. Lafferty, supra. This Court in Mullaney expressly rejected the notion held by the lower federal courts that it was. 421 U.S. at 690-691. In Maine "malice is not a designation of any subjective state of mind existing as a fact." State v. Rollins, 295 A2d 914, 920 (Me. 1972) quoted and cited with approval in Lafferty, supra, at 664. Malice, in Maine, was nothing more than "a fictional metaphysical term of art." State v. Lafferty, supra at 672 (concurring opinion). It is true that a portion of the trial judge's instructions to the jury as summarized in Mullaney were:

> "(T)hat if the prosecution established that the homicide was both intentional and unlawful, malice aforethought was to be conclusively implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation. The court emphasized that 'malice aforethought and heat of passion on sudden provocation are inconsistent things.' id. at 62; thus, by proving the latter the defendant would negate the former and reduce the homicide from murder to manslaughter. The court then concluded its charge with elaborate definitions of 'heat of passion' and 'sudden provocation.'" 421 U.S. at 686-687. (Emphasis supplied.)

As later analysis of Maine's law in Lafferty, adopted by this Court in Mullaney, makes clear, however, there was no evidentiary

presumption of malice operating in Maine. None was required. Maine's conclusive implication of malice which arose from proof of an unlawful and intentional killing unless the defendant proved by a fair preponderance of the evidence that he acted in heat of passion on sudden provocation meant simply that murder in Maine was an unlawful and intentional killing not done in the heat of passion where the issue of heat of passion was raised. The State, however, was not required to prove the absence of heat of passion. In this it was found that due process was wanting in the following words:

> "Maine law requires a defendant to establish by a preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter. Under this burden of proof a defendant can be given a life sentence when the evidence indicates that it is as likely as not that he deserves a significantly lesser sentence. This is an intolerable result in a society where, to paraphrase Mr. Justice Harlan, it is far worse to sentence one guilty only of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter. In re Winship, 397 U.S., at 372, 90 S. Ct. at 1076 (concurring opinion). We therefore hold that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." 421 U.S. at 703.

In North Carolina, by contrast, malice signifies a significant state of mind without which there can be no murder in the second degree. The trial judge so instructed the jury here, telling them that malice meant "hatred, ill-will or spite" and "that condition of mind which prompts a person to take the life of another intentionally, or to intentionally inflict a wound with a deadly weapon upon another . . . ." North Carolina's presumptions then of malice and unlawfulness are evidentiary presumptions. They flow from proof of certain facts regarding the manner of the killing, or how it was accomplished. The facts to be presumed, malice and unlawfulness, remain essential elements to be proved by the State. "While . . . the intentional killing of another with a deadly weapon raises two presumptions against the defendant, first, that the killing was unlawful, and second, that it was done with malice

. . . (citation omitted) this rule of law does not mean that the burden of showing an unlawful killing does not still rest with the State." State v. Carter, 254 N.C. 475, 478, 119 S.E. 2d 461 (1961); accord, State v. Johnson, 261 N.C. 727, 136 S.E. 2d 84 (1964).

A presumption of unlawfulness was, of course, not dealt with in Mullaney.

Mullaney, however, at n. 31, recognizes generally, the validity of inferences and presumptions to aid the prosecution in a criminal case so long as they meet "certain due process requirements" citing with approval Barnes v. United States, 412 U.S. 837 (1973) (knowledge that property was stolen may be inferred from unexplained possession of recently stolen property); Turner v. United States, 396 U.S. 398 (1970) reh. denied, 397 U.S. 958 (knowledge that heroin was illegally imported may be inferred from its being knowingly possessed; the same inference is not constitutionally permissible with regard to cocaine). United States v. Gainey, 380 U.S. 63 (1965) ("carrying on" illegal manufacture of whiskey may be inferred from unexplained presence at an illegal still); and Davis v. United States, supra (presumption of sanity approved as a matter of federal practice).

Unless then the presumptions of malice and unlawfulness as explained to the jury in this case have the effect of relieving the prosecution of the burden of proving an essential element of murder in the second degree where the issue of its existence is properly presented, the real evil prescribed by Mullaney, the North Carolina position in State v. Sparks, supra, that these presumptions are constitutional is correct. Accordingly, this question will be examined in the light of Mullaney.

First there is no evidence in this case of a killing in the heat of passion on sudden provocation. Therefore this issue is not "properly presented" as it was in Mullaney. There could not, consequently, be any Mullaney error prejudicial to defendant on this aspect of the case.

As a matter of State law, however, and as the jury was instructed here, North Carolina's rules allocating burden of proof on self-defense and heat of passion are the same. As early as 1868 the North Carolina court said in State v. Willis, supra at pages 29-30,

> "in the proof of such matters we do not recognize any distinction between the case where the question is whether the homicide is murder or manslaughter, and that where it is whether the killing is murder or excusable or justifiable homicide."

There was here evidence of self-defense. The issue regarding its existence was properly presented. Inasmuch as there were jury instructions given as if there were evidence of a heat of passion killing, this argument will treat this case as if such evidence were present.

The North Carolina presumptions as explained to the jury in this case did not relieve the State of the ultimate burden of proof as to malice and unlawfulness. The trial judge placed on the State the burden to prove defendant's guilt beyond a reasonable doubt. He told the jury that a reasonable doubt "as to any fact necessary to constitute the guilt of the defendant" would require an acquittal. In his explanation of second degree murder, he told the jury that those facts were: (1) an intentional shooting with a deadly weapon; (2) without justification or excuse; (3) with malice, and (4) proximately resulting in another's death; and he placed upon the State the burden to prove each of these facts beyond a reasonable doubt. In his final mandate to the jury, he again placed the burden on the State to prove beyond a reasonable doubt an intentional killing with malice and without justification or excuse and reminded the jury, "if you do not so find, or have a reasonable doubt as to one or more of these things" that it would not return a verdict of guilty of second degree murder. (Emphasis supplied.) After the jury returned for further instructions it was again made clear, this time by negative implication, that the State had the burden of proof on malice. It was also explained that the self-defense instructions given on second degree murder applied also to manslaughter:

> "In other words, the difference between second degree murder and manslaughter is the absence of malice in manslaughter. I defined malice for you. I will be glad to define it for you again if you want me to. Also, I want to instruct you that the charge I gave you as to self-defense would apply equally to manslaughter as it would to second degree murder in that if you find the defendant was justified or excused in the killing because he was acting in self-defense then you would find him not guilty as to either one . . . . Well, I will define malice for you. The difference between second degree murder and manslaughter, as I

told you, is that it is not necessary for the State to prove malice in order for you to find him guilty of manslaughter. (Emphasis supplied.)

The jury was told further that the presumptions of malice and unlawfulness necessarily result in a finding of guilt of second degree murder only if nothing else appears. The effect of this statement was to impose upon the defendant a burden to go forward with, or produce, some evidence of all elements of self-defense or heat of passion on sudden provocation, or rely on such evidence as may be present in the State's case. There is no suggestion in Mullaney that placing such a burden of producing evidence upon a defendant violates Fourteenth Amendment Due Process. "Nothing in this opinion is intended to affect that requirement." Mullaney v. Wilbur, supra, n. 28.

On the other hand if there is evidence tending to show all elements of heat of passion on sudden provocation or self-defense the presumptions of malice and unlawfulness, respectively, under the jury instructions given here need not disappear but could be weighed against this evidence. There is nothing constitutionally infirm about this. In United States v. Barnes, supra, n. 9, the Supreme Court said:

> "Of course, the mere fact that there is some evidence tending to explain a defendant's possession consistent with innocence does not bar instructing the jury on the inference. The jury must weigh the explanation to determine whether it is 'satisfactory' . . . . The jury is not bound to accept or believe any particular explanation any more than it is bound to accept the correctness of the inference. But the burden of proving beyond a reasonable doubt that the defendant did have knowledge that the property was stolen, an essential element of the crime, remains on the government."

In Maine, where heat of passion was the essential difference between murder and manslaughter, the burden was never placed on the State at any time to prove its nonexistence by any standard of proof; rather the defendant was required to prove its existence by a "fair preponderance of the evidence." Under the instructions here given the burden to prove malice and unlawfulness beyond a reasonable doubt was clearly and repeatedly placed on the State.

From the foregoing therefore, it is apparent that in the past, the North Carolina Court used "presumption of malice" from the

intentional use of a deadly weapon in the sense of an inference rather than a true presumption of law. What the Court was really saying was when the prosecution proved beyond a reasonable doubt that the accused proximately caused the death by the intentional use of a deadly weapon the fact-finder would be justified in inferring an intent to kill on the part of the accused. As noted in Evans v. State, supra, a perceptive and exhaustive opinion:

> "Some mislabled 'presumptions' have turned out, upon careful examination, to be nothing more than permitted inferences of fact." 349 A. 2d at 338.
>
> Later, it was noted:
>
> "The only inference of any significance in our homicide law is the permitted inference of an intent to kill or of an intent to do grievous bodily harm from the directing of a deadly weapon at a vital part of the human anatomy or from some similar use of deadly force. The earlier case law sometimes spoke of the use of a deadly weapon as giving rise to a 'presumption of malice'. In Lindsay v. State, (8 Md. App. 109, 258 A. 2d 760) however, Chief Judge Orth stole a march on Mullaney v. Wilbur and strove mightly to refine the appellate vocabulary of Maryland and to bring it into the 20th century. He meticulously explained that we do not 'presume' anything from the use of deadly force; we are only permitted (but not required) to draw inferences from such use of deadly force. He further pointed out that this permitted inference of fact passes full constitutional muster under Leary v. United States, (395 U.S. 6 (1969)). We reaffirm and add that it thereby also passes constitutional muster according to Mullaney v. Wilbur and Winship." 349 A. 2d at page 339.

The reasoning of the Maryland Court applies with full force to North Carolina. The North Carolina Court, in as recent a decision as State v. Williams, 288 N.C. 680, ___ S.E. 2d ___ (1975), was still talking in terms of a "presumptions" from the intentional use of a deadly weapon when, in actuality, what it meant was an "inference" from this evidence. This, as argued above, is a far cry from a true presumption in law, such as existed in Maine and Maryland, which shifts the burden of persuasion to the defendant to negate an element of the crime. When this misplaced and misnamed "presumption" is viewed in its true nature, North Carolina law contains no presumptions which shift any burden of persuasion to the defendant. This being so, any similarity between the North Carolina law and either the Maine law condemned in Mullaney

and the Maryland law found wanting in Evans ends. The North Carolina law, however inartfully articulated by its Court over the years, is not constitutionally infirm by the due process standards set forth in Winship and Mullaney.

II.

THE SUPREME COURT OF NORTH CAROLINA ERRONEOUSLY APPLIED THE MULLANEY V. WILBUR DOCTRINE TO THE INSTRUCTIONS UNDER ATTACK.

In the event this Court decides to grant the Petition for Certiorari to consider the question of retroactivity or the use of evidentiary presumptions of malice or unlawfullness arising out of the intentional use of a deadly weapon, the State of North Carolina would ask this Court to consider the question of whether its Supreme Court was correct in its conclusions that the doctrine of Mullaney v. Wilbur invalidated the longstanding North Carolina jury instructions as to sudden provocation on heat of passion and self-defense. It appears to the Respondent that its Court, in an overabundance of caution to follow the commands of this Court, may have misinterpreted and thereby misapplied the doctrine announced in Mullaney. Because this Court is the only body which can make authoritative interpretations of its decisions, the interpretation of the exact scope of Mullaney to jury instructions markedly different from those considered in Maine may, consequently, have been in error. It is the position of the Respondent that its Supreme Court was in error.

There is nothing improper in the Respondent taking this position. In California v. Greene, 399 U.S. 149(1970), the State of California was successful in getting an erroneous decision of its Supreme Court applying federal constitutional provisions embodied in the fifth amendment corrected. In Michigan v. Payne, 412 U.S. 47(1973), an erroneous decision of the Michigan Supreme Court applying the doctrine of North Carolina v. Pearce, 395 U.S. 711 (1969), retroactively was reversed when it was ultimately held that Pearce was not to be applied retroactively. Accordingly, all the Respondent is asking is that this Court look at the jury instructions under attack as well as the prior North Carolina Law which gave rise to these instructions to see if they

comport with the new due process standards recently announced. The Respondent feels they do and thus disagrees with its Court's decision.

The reasons for this disagreement are adequately covered in Argument I preceeding and, other than in summary fashion, they will not be repeated here. The Respondent feels that its rules of proof "to the satisfaction" of the jury do not create a constitutionally significant shift of the burden of persuasion to defendants in homicide prosecutions. Further, the Respondent feels the evidentiary presumptions or inferences as to malice and unlawfullness long used in North Carolina where there is an intentional use of a deadly weapon are not invalidated by Mullaney. For this reason, therefore, the Respondent most urgently asks this Court to undertake an examination of North Carolina's rules of it should decide to grant certiorari.

SUMMARY AND CONCLUSION

The position of the Respondent, State of North Carolina,is that the conclusions of its Court of Appeals and Supreme Court that no error prejudicial to the Petitioner in the conduct of his trial has been shown by the record of the proceedings is correct. Accordingly, the Respondent argues that his petition should not be granted. The petitioner, at no stage of the proceedings, has denied that he fired a pistol at the deceased. His consistent contention has been that his actions were not unlawful because he acted in self-defense. Unfortunately, because there were no witnesses to the shooting, his uncorroborated story has been pitted against many facts and circumstances which tended to show a situation contrary to his version. He has had a full opportunity to tell his story to an unquestioned and unquestionably impartial jury which chose to reject his version. Because of this, the Respondent submits substantial justice has been done and, therefore, the conclusion reached by the jury, who had full opportunity to observe the demeanor of all witnesses, should not be disturbed.
It is the further position of the Respondent that the long established

rules of law in North Carolina as to the burden of proof in homicide cases where issues of sudden provocation in heat of passion and self-defense are present are constitutionally sound and consistent with due process. Consequently, its Supreme Court was well justified in its conclusion that these rules should not be changed as to those cases in which the trial had been completed prior to the date of the announcement of Mullaney.

The Respondent has no quarrel with the commendable caution of its Supreme Court in striking out of its law any portions thereof which might be remotely or arguably in conflict with this Court's command in Mullaney and with its admonition to all trial judges who conduct trials after the date of Mullaney. This part of its Court's opinion is beyond doubt free from any error.

Finally, the Respondent, although steadfastly believing that further appellate review of Petitioners trial is neither desirable or justified, urges that in the event this Court decides to grant certiorari, that it consider whether the Supreme Court of North Carolina was in error by applying the Mullaney standards even prospectively to North Carolina. The Respondent urges, as heretofore developed, that its law is and always has been in full accord with the due process standards announced in Mullaney.

Respectrully submitted, this the 15th day of June, 1976.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-6568

JOHNNIE B. HANKERSON,

Petitioner,

v.

THE STATE OF NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF NORTH CAROLINA

BRIEF OF PETITIONER

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THE STATE OF NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF NORTH CAROLINA

BRIEF OF PETITIONER

CITATIONS TO OPINIONS BELOW

From a verdict of guilty of second degree murder and judgment of imprisonment entered by the Superior Court of Nash County, North Carolina on November 21, 1974, petitioner appealed to the North Carolina Court of Appeals (Intermediate Appellate Court). The opinion of the North Carolina Court of Appeals finding no error in petitioner's trial is reported in *State v. Hankerson*, 26 N.C. App. 575, 217 S.E.2d 9 (1975), *Arnold, J.*, dissenting. Petitioner exercised his appeal of right pursuant to North Carolina General Statute 7A-30 (2) which grants an appeal as a matter of right from the North Carolina Court of Appeals to the Supreme Court of North Carolina in cases in which there is a dissent. The opinion of the Supreme Court of North Carolina finding no error is reported in *State v. Hankerson*, 288 N.C. 632, 220 S.E.2d 575 (1975) (A. 16).

JURISDICTION

Petitioner invoked the jurisdiction of this Court pursuant to Title 28, United States Code. §1257(3), it being petitioner's contention that he was denied due process of law under the Fourteenth Amendment to the Constitution of the United States by the decision of the North Carolina Supreme Court in *State v. Hankerson* which refused to apply the constitutional principals set out by this Court in *Mullaney v. Wilbur*, 421 U.S. 684 (1975), to petitioner's case. The decision of the Supreme Court of North Carolina in *State v. Hankerson* was rendered on December 17, 1975. Petitioner made application to this Court through counsel for an Extension of Time Within Which to File Petition for Writ of Certiorari. The application was granted extending the time for filing such Petition to and including April 15, 1976 by order of Chief Justice Warren E. Burger dated March 12, 1976. On April 12, 1976 Motion for Leave to Proceed *In Forma Pauperis* and Petition for Writ of Certiorari were filed in this Court. On October 4, 1976, the Motion and Petition were granted by this Court.

CONSTITUTIONAL PROVISION INVOLVED CONSTITUTION OF THE UNITED STATES, AMENDMENT *XIV*

"§. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTION PRESENTED

Did the Supreme Court of North Carolina deny the petitioner, Johnnie B. Hankerson, due process of law under the Fourteenth Amendment to the Constitution of the United States when said Court refused to apply *Mullaney v. Wilbur*, 421 U.S. 684 (1975) to petitioner's case because it was tried prior to June 9, 1975?

STATEMENT OF THE CASE

On September 29, 1974, petitioner was arrested and taken into custody on the charge that he did unlaw-

fully, willfully, and feloniously and of his malice aforethought kill and murder Gregory Eugene Ashe. This charge resulted from the death of Gregory Eugene Ashe on said date from a wound caused by a bullet fired from a pistol. Petitioner and his attorney waived the finding and return into court of a bill of indictment and agreed that the case be tried upon information alleging that on or about the 29th day of September 1974, in Nash County, petitioner unlawfully and willfully did feloniously and with malice by the use of a deadly weapon, to wit a pistol, kill and murder Gregory Eugene Ashe contrary to the form of the statute in such case made and provided and against the peace and dignity of the State. At the November 18, 1974, Session of Nash County Superior Court, upon his plea of not guilty, petitioner was tried and convicted of second degree murder and sentenced to a term of not less than twenty (20) nor more than twenty-five (25) years in the State's prison.

Evidence for the State at trial tended to show the following facts: Gregory Ashe died September 29, 1974 as the result of a gunshot wound to the heart. Ashe and some friends had been together on the night in question and upon Ashe being unable to start his car, his companions started walking away from the car. As Ashe went back to make another attempt to start the car, the friends heard a gunshot, heard Ashe exclaim he was shot, and saw a yellow Plymouth "Satelite" speed away from the scene. After some difficulty in finding Ashe due to the darkness of the night, his body was found lying face down in a nearby field with a cigarette that had been lighted in one hand. After determining that the automobile seen leaving the scene belonged to petitioner, law enforcement officers went to his home where petitioner gave the following story.

Petitioner said that he was riding slowly near where

Gregory Ashe was shot when someone asked him for a light. He stopped and gave his cigarette lighter to a black male, and when he reached to put the lighter back in its holder, he felt someone shaking the right front door, which door was locked. Petitioner further stated that he was then grabbed by the person to whom he had given a light and that this person also put a knife to his throat. Petitioner told the officers that he then picked up a gun from the right front seat of his car and shot at his assailant before speeding away. A law enforcement officer searched petitioner's car and found a knife on the seat to the right of the driver's seat. Petitioner gave the officer a shirt and showed him grease marks on the shirt which he stated were left by the person who had assaulted him. Witnesses for the State testified that the deceased had never been seen with a knife like the one found on the seat of the car. Blood was observed on the driver's side of the car, just behind the door.

Evidence for petitioner consisted of petitioner's account of the shooting as given to the officers and testimony by his family that upon coming home he admitted that he had shot at someone after having a knife put to his neck. Petitioner testified that he did not own the knife found in his car and members of his family stated that they had never seen him with a knife like the one found on the front seat of the car. Petitioner surmised that his assailant dropped the knife in the car. A number of witnesses testified concerning petitioner's good character.

In apt time petitioner gave notice of appeal to the North Carolina Court of Appeals which appeal was argued in the North Carolina Court of Appeals on May 29, 1975. The North Carolina Court of Appeals upheld the judgment of the trial court, in *State v. Hankerson*, 26 N.C. App. 575, 217 S.E.2d 9 (1975) decided July

16, 1975, certified July 28, 1975, *Arnold J.*, dissenting. Petitioner appealed to the Supreme Court of North Carolina pursuant to North Carolina General Statute 7A-30(2), which statute grants an appeal as a matter of right from the North Carolina Court of Appeals to the Supreme Court of North Carolina in cases in which there is a dissent. Petitioner's Notice of Appeal to the Supreme Court of North Carolina was filed in that court on July 31, 1975. On August 19, 1975 petitioner filed in the Supreme Court of North Carolina a Motion to Amend the Record to note additional exceptions and assignments of error which would raise for review additional questions suggested by this Court in *Mullaney v. Wilbur*, 421 U.S. 684 (1975) (hereinafter referred to as *Mullaney*), decided on June 9, 1975. Petitioner's Motion to Amend the Record to note additional exceptions and assignments of error was allowed on September 2, 1975, and the case was argued in the Supreme Court of North Carolina on September 10, 1975. The Supreme Court of North Carolina affirmed petitioner's conviction in a decision filed December 17, 1975 and reported in 288 N.C. 632, 220 S.E.2d 575, on the theory that *Mullaney* was not applicable to cases tried prior to June 9, 1975.

SUMMARY OF ARGUMENTS

I.

THE SUPREME COURT OF NORTH CAROLINA ERRED IN NOT APPLYING *MULLANEY V. WILBUR* RETROACTIVELY SINCE THE DOCTRINE OF *MULLANEY* AS IT RELATES TO PETITIONER'S CASE GREATLY AFFECTED THE RELIABILITY OF THE FACT-FINDING PROCESS.

In petitioner's case, the jury was instructed that (a) in order to reduce the crime from second degree murder to manslaughter, defendant had the burden of proof to the satisfaction of the jury that there was no malice on his part, and (b) that to excuse his act altogether on grounds of self-defense, the defendant had the burden of proof to the satisfaction of the jury that he acted in self-defense. The North Carolina Court held that these instructions violated the constitutional principals of *Mullaney v. Wilbur*, but did not apply *Mullaney* to petitioner's case. Petitioner contends that these instructions greatly affected the fact-finding function in his case and that he therefore should have been given the benefit of *Mullaney v. Wilbur*.

II.

THE SUPREME COURT OF NORTH CAROLINA SHOULD HAVE GIVEN *MULLANEY V. WILBUR* AT LEAST THE LIMITED RETROACTIVE AFFECT OF APPLYING IT TO PETITIONER AS HIS CASE WAS PENDING ON DIRECT APPEAL ON JUNE 9, 1975.

North Carolina law does not require a defendant to except at trial to erroneous jury instructions as to applicable law, and such exceptions may be set out for the first time in his case on appeal. During the appellate process of petitioner's case in the State Court, petitioner took appropriate action to take exception to the judge's charge in petitioner's trial as it related to *Mullaney*. Petitioner's case was pending on direct appeal as a matter of right when *Mullaney* was decided June 9, 1975, and petitioner's exceptions to the judge's charge in his trial therefor were as effective as if raised at the time such erroneous instructions were made.

ARGUMENTS

ARGUMENT I.

THE SUPREME COURT OF NORTH CAROLINA ERRED IN NOT APPLYING *MULLANEY* RETROACTIVELY SINCE THE DOCTRINE OF *MULLANEY* AS IT RELATES TO PETITIONER'S CASE GREATLY AFFECTED THE RELIABILITY OF THE FACT-FINDING PROCESS.

On June 9, 1975, this Court decided *Mullaney v. Wilbur*, 421 U.S. 684, which held that Maine's rule requiring a defendant charged with murder to prove by a preponderance of the evidence, in order to reduce homicide to manslaughter, that he acted in the heat of passion on sudden provocation, violated the requirement, under the due process clause of the Fourteenth Amendment, that the prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime charged, and to satisfy due process, the prosecution must prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case.

The Supreme Court of North Carolina in its decision in *State v. Hankerson*, 288 N.C. 632, 220 S.E.2d 575 (1975) reversed long-standing rules as to the burden of proof in homicide cases in North Carolina:

> "We hold that by reason of the decision in *Mullaney* the Due Process Clause of the Fourteenth Amendment prohibits the use of our long-standing rules in homicide cases that a defendant in order to rebut the presumption of malice must prove to the satisfaction of the jury that he killed in the heat of a sudden passion and to rebut the

> presumption of unlawfulness, that he killed in self-defense. *The instructions given here insofar as they placed these burdens of proof on the defendant violate the concept of due process announced for the first time in Mullaney*. We decline, however, for reasons hereinafter stated, to give *Mullaney* retroactive effect in North Carolina. We hold that because the trial judge instructed the jury in accordance with our law of homicide as it stood, and in a trial conducted, before the *Mullaney* decision, the defendant is not entitled to the benefit of the *Mullaney* doctrine. We will, however, apply the decision to all trials conducted on or after June 9, 1975." 228 N.C. at 643. (A. 27) (Emphasis supplied.)

The Supreme Court of North Carolina then left no question that *Mullaney* was applicable in North Carolina to the burden of proof doctrines in a homicide case, and that these doctrines as applied by the trial judge in his charge to the jury in petitioner's case violated the Due Process Clause of the Fourteenth Amendment. However, the Supreme Court of North Carolina citing that petitioner's case was tried November 21, 1974 and that *Mullaney* was decided June 9, 1975, declined, "without further guidance from the Supreme Court, to give the decision [*Mullaney*] retroactive effect." *State v. Hankerson, supra,* at 652 (A. 27).

The Supreme Court of North Carolina recognized that within the three-pronged test for retroactive application of a new constitutional rule, the purpose to be served by the new rule is the most important prong, more so than either reliance on previous decisions, or the effect on the administration of justice of retroactive application. *State v. Hankerson, supra,* at 653 (A. 37). Relying on *Ivan V. v. City of New York*, 407 U.S. 203 (1972) which held retroactive *In Re Winship*, 397 U.S. 358 (1970), and also citing *Roberts v. Russell*, 392 U.S.

293 (1968) which held retroactive *Bruton v. United States*, 391 U.S. 123 (1968), the Supreme Court of North Carolina noted that "[i]f the rule is designed to protect the reliability of the fact finding process and 'the constitutional error presents a serious risk that the issue of guilt or innocence may not have been reliably determined' then it has been said that the decision will on this basis alone be given full retroactive effect." *State v. Hankerson, supra,* at 653 (A. 37). However, the Supreme Court of North Carolina, in an effort to justify its "prospective only" application of *Mullaney* to petitioner's case, then went on to conclude, "how that factor [the purpose to be served by the new rule] is approached by the Supreme Court *seems sometimes* to depend on analysis of the other two factors." *State v. Hankerson, supra,* at 653 (A. 38). (Emphasis supplied.) In reaching this conclusion the Supreme Court of North Carolina relied heavily on *Tehan v. United States ex rel. Shott*, 382 U.S. 406 (1966).

Petitioner contends that the North Carolina Supreme Court should never have considered the two prongs of previous reliance on past decisions or the effect on the administration of justice of retroactive application of the new rule. For as in *Ivan*:

> " 'Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guiity verdicts in past trials, the new rule has been given complete retroactive effect. 'Neither good faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.' " *Ivan V. v. City of New York*, 407 U.S. 204 (1972). (Citations omitted.)

Petitioner submits that the constitutional doctrine of *Mullaney* is one designed to overcome an aspect of petitioner's trial that substantially impaired the jury's truth-finding function, and that as such, the new doctrine must be given complete retroactive effect regardless of good faith reliance by state authorities on prior law or practice and despite any impact, even a severe impact, on the administration of justice. The Supreme Court of North Carolina either ignored or refused to see that the purpose of *Mullaney* was to correct error that lay at the very heart of the jury's fact-finding function. The Supreme Court of North Carolina surmised that it is a matter of "*pure speculation*" whether the jury instructions condemned in *Mullaney*, and even condemned by the North Carolina Court in petitioner's case, could in the final analysis effect the fact-finding process of the jury. *State v. Hankerson, supra*, at 655 (A. 40). (Emphasis supplied.) Petitioner submits that the reasoning of the Supreme Court of North Carolina misses the whole significance of *Mullaney* in the establishment of the reasonable doubt standard in the scheme of criminal procedure. For as *Winship* emphasizes, "[t]he [reasonable doubt] standard provides concrete substance for the presumption of innocence–that bedrock 'axiomatic and elementary' principal whose 'enforcement lies at the foundation of the administration of our criminal law.' " *In Re Winship, supra*, at 363. (Citations omitted.)

In enabling itself to consider the less important factors of reliance on previous decisions and the effect on the administration of justice, the Supreme Court of North Carolina placed a jury instruction that required the defendant to carry the burden of proof in the same category with those condemned practices whose effect on the truth-determining process are only *probabilities. State v. Hankerson*, at 655 (A. 40). (Emphasis sup-

plied.) Petitioner does not assert that the best manner for determining whether a case should be given retroactive effect is by first categorizing previous cases and then deciding into which category the case falls. However, a review of the cases of this Court giving prospective only application at least serves the value of showing that petitioner's case clearly does not fall within that line of decisions:

Mapp v. Ohio, 367 U.S. 643 (1961), limitation on use of illegally obtained evidence;

Escobedo v. Illinois, 378 U.S. 478 (1964), right to counsel during police interrogation;

Griffin v. California, 380 U.S. 609 (1965), prosecution's comment on defendant's failure to testify prohibited;

Miranda v. Arizona, 384 U.S. 436 (1966), requirements of investigating officers to warn defendant of rights prior to questioning;

United States v. Wade, 388 U.S. 218 (1967), right to counsel during lineups;

Katz v. United States, 389 U.S. 347 (1967), limitations on electronic eavesdropping;

Duncan v. Louisiana, 391 U.S. 145 (1968), right to jury trial;

Lee v. Florida, 392 U.S. 378 (1968), limitation on use of wiretap evidence at trial;

Boykin v. Alabama, 395 U.S. 328 (1969), requirements in the form of guilty plea;

Chimel v. California, 395 U.S. 752 (1969), limitations on search incident to lawful arrest, and *Coleman v. Alabama*, 399 U.S. 1 (1970), right to counsel at preliminary hearing.

On the other hand, new doctrines which have been given full retroactive effect are:

Griffin v. Illinois, 351 U.S. 12 (1956), right of indigent defendant to transcript on appeal;

Hamilton v. Alabama, 368 U.S. 52 (1961), right to counsel at arraignment;

Douglas v. California, 372 U.S. 353 (1963), right to assistance of counsel on appeal;

Gideon v. Wainwright, 372 U.S. 335 (1963), right to assistance of counsel at trial;

White v. Maryland, 373 U.S. 59 (1963), right to assistance of counsel at guilty plea;

Jackson v. Denno, 378 U.S. 368 (1964), requirement of fair hearing to determine voluntary confession;

Mempa v. Rhay, 389 U.S. 128 (1967), right to assistance of counsel at probation hearing;

Barber v. Page, 390 U.S. 719 (1968), Sixth Amendment right to confrontation during trial;

Bruton v. United States, 391 U.S. 123 (1968), Sixth Amendment right to confrontation prohibits use of confession by codefendant implicating defendant;

Witherspoon v. Illinois, 391 U.S. 510 (1968), disqualification of death penalty inclined jurors;

In Re Winship, 397 U.S. 358 (1970), burden of proof beyond a reasonable doubt required in juvenile proceedings; and

Waller v. Florida, 397 U.S. 387 (1970), double jeopardy applies in State and municipal prosecution on same act or offense.

It is petitioner's argument that the category of condemned practices which are only "probabilities" so far as the integrity of the truth-determining process is concerned is the category listed above which have been given prospective only application. This category of condemned practices is the one this court has consistently found to be essentially prophylactic in character, designed to deter police and courts from practices which have little to do with the accurate determination of guilt or innocence. The major purpose of *Winship* as stated by this Court in *Ivan*, is "to overcome an aspect

of a criminal trial that substantially impairs the truth finding function." *Ivan V. v. The City of New York, supra,* at 205. Petitioner submits that this is likewise the major purpose of *Mullaney*, and that where an individual has been convicted by the use of a jury instruction that puts the burden of proof on that individual, the possibility that his conviction was erroneous, because not supported by proof beyond a reasonable doubt, becomes a reality.

Petitioner takes the position then that the jury instructions which placed the burden of proof on him to satisfy the jury that he killed in the heat of a sudden passion to rebut the presumption of malice and that he killed in self defense to rebut the presumption of unlawfulness were, under *Mullaney*, a greatly determinative factor in the fact-finding process. The instructions of the trial court placed upon the petitioner the burden of proving to the jury's satisfaction the absence of malice in order to reduce the crime from second degree murder to manslaughter. *State v. Hankerson, supra*, at 642 (A. 10). The instructions of the trial court placed upon the petitioner the burden of proving to the jury's satisfaction that he acted in self defense in order to excuse the act altogether. *State v. Hankerson, supra*, at 642 (A. 10). The maximum punishment for second degree murder in North Carolina is now, and was on the controlling date in petitioner's case, life imprisonment and the maximum penalty for manslaughter was and is twenty years imprisonment. (*N.C. Gen. Stats.* §14-17 and §14-18). To deny petitioner the benefit of the constitutional rules laid down in *Mullaney* has constituted as to him the most harmful violation of his constitutional right to due process of law. With that being the case, the factors of reliance by authorities on previous decisions and the effect on the administration of justice of the retroactive application of *Mullaney* are not deserving of consideration.

Petitioner will, arguendo, address himself to these two factors. The extent of reliance by law enforcement authorities on previous standards is worthy of consideration only to the extent that new standards have not been foreshadowed. The strengthening of the reasonable doubt standard as a basic doctrine of due process of law is not an innovative concept. From the premonitions of *Davis v. United States*, 160 U.S. 469 (1895), to the clear implications of *In Re Winship, supra,* six years ago, the trend of due process of law has been to place on the prosecution the burden of proving beyond a reasonable doubt all of the elements of the crime.

The Supreme Court of North Carolina in denying petitioner the benefit of *Mullaney* gave primary weight to the effect retroactive application would have on the administration of justice. *State v. Hankerson, supra,* at 653-655 (A. 38-40). Petitioner admits that retroactive application of *Mullaney* would burden some of those who administer justice. However, the purpose of such a burden, the seeking out and freeing of wrongly convicted defendants and the conviction of only those who are guilty beyond a reasonable doubt, is the ultimate purpose of our system of justice. To say this burden is too expensive, time-consuming, or impractical for our judicial system is to place expediency ahead of due process of law. To say it would free one guilty man, or one hundred, or any number is to make a travesty of our judicial system for as Mr. Justice Harlan stated in his concurring opinion in *Winship*, "the requirement of proof beyond a reasonable doubt in a criminal case is bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In Re Winship, supra,* at 372-a statement echoed in *Mullaney, supra*, at 703-04. If this is true, as petitioner contends, the

argument for retroactivity is overwhelming. Our system values truth and due process, though often burdensome, above the effortless administration of justice. The State or Government's interest should only be the conviction of *guilty* people.

Retroactive application affecting trials long past, and in all probability allowing some guilty persons to go free, has been the necessary decision of this Court in those cases wherein full retroactivity was allowed. Such cases have undoubtedly affected the administration of justice in many jurisdictions. Petitioner contends, however, that the individuals who administer justice in those jurisdictions have ultimately served justice far more by bearing this burden. Petitioner asks no more of his state than that it administer to him a fair trial as this Court has defined a "fair trial" and as the constitution guarantees him.

ARGUMENT II.

THE SUPREME COURT OF NORTH CAROLINA SHOULD HAVE GIVEN *MULLANEY* AT LEAST THE LIMITED RETROACTIVE EFFECT OF APPLYING IT TO PETITIONER AS HIS CASE WAS PENDING ON DIRECT APPEAL ON JUNE 9, 1975.

To place *Mullaney* in the time frame of petitioner's case, *Mullaney* was decided between the date of the oral argument on petitioner's appeal in the North Carolina Court of Appeals (A. 1) and the date that court handed down its decision (A. 2) with one of the three judges dissenting. Petitioner then made a timely appeal to the Supreme Court of North Carolina as a matter of right pursuant to North Carolina General Statute 7A-30(2), which grants an appeal of right to that court when there is dissent to the decision of the North Carolina Court of Appeals. After notice of appeal was given by petitioner to the Supreme Court of North

Carolina (A. 2), but before the date of the oral argument on petitioner's appeal in that court (A. 2), petitioner filed in the Supreme Court of North Carolina a Motion to Amend the Record to note additional exceptions and assignments of error raising new questions suggested by *Mullaney*. The State of North Carolina filed a response to the Motion to Amend the Record and prayed that the Motion be denied. However, the Supreme Court of North Carolina allowed the Motion (A. 2), the new exceptions and assignments of error were made a part of the record and the questions suggested by *Mullaney* in petitioner's case were argued before the Supreme Court of North Carolina. As noted in Argument I above, the Supreme Court of North Carolina applied *Mullaney* to change long-standing rules as to the burden of proof in homicide cases in North Carolina, but denied the benefit of *Mullaney* to any cases, like petitioner's, which were tried before June 9, 1975.

It has been a long-standing rule of North Carolina appellate procedure that certain exceptions need not be made at the time error in the trial is committed, and these certain exceptions are, if properly made a part of the case on appeal, deemed taken at the time the alleged error occurred. One of these is an exception to the trial court's instructions as to applicable law. *State v. Lambe*, 232 N.C. 570, 61 S.E. 608 (1950). Petitioner contends that under North Carolina appellate procedure, proper exception was taken to the charge to the jury as it related to *Mullaney*, and that under applicable North Carolina law such exceptions were deemed taken as if made at the time of the erroneous jury instruction. Therefore petitioner further contends that since his case was pending on appeal as a matter of right, the benefit of the exceptions made and preserved to the judge's charge in his case should have been recognized by the Supreme Court of North Carolina to give him the benefit of due process of law under *Mullaney*. To have reached this conclusion, the Supreme Court of North Carolina would not have been influenced, as it ap-

parently was, by what it termed "the devastating impact" the retroactivity of *Mullaney* would have on the administration of justice in this country. *State v. Hankerson, supra,* at 655 (A. 40).

With petitioner having thus followed the proper procedures to take exception to the judge's charge and to properly bring such exceptions before the Supreme Court of North Carolina, petitioner earnestly contends that no final judgment had been entered in his case at the time *Mullaney* was decided. In fact, under the procedures he followed, from a procedural standpoint, it was as if his case had been tried subsequent to *Mullaney*.

Even if the Supreme Court of North Carolina could not accept this reasoning, there is ample authority of this Court to have allowed the Supreme Court of North Carolina to apply *Mullaney* to cases, like petitioner's, which were pending on direct review at the time *Mullaney* was decided. *Linkletter v. Walker*, 381 U.S. 618 (1965). Indeed, *Tehan v. United States, supra* (on which the Supreme Court of North Carolina relied in denying retroactive application, *State v. Hankerson, supra,* at 653), denied the benefit of the new constitutional rule only to those cases in which the judgment of conviction had been rendered, the availability of appeal exhausted, and the time for petition of certiorari elapsed or a petition for certiorari finally denied all before the date of the decision establishing the new rule.

Petitioner's case as it appeared before the Supreme Court of North Carolina was a case of first impression in which that court was presented with the question of the applicability of *Mullaney* to the rules as to the burden of proof in homicide cases in North Carolina. As the narrowest alternative, the Supreme Court of North Carolina should have held *Mullaney* applicable to petitioner's case only (and of course prospectively to other cases). To deny petitioner that narrow benefit of *Mullaney* is to take away from all appellants and their

counsel the incentive of advancing contentions requiring a change in law. Here, petitioner in good time under North Carolina procedure advanced initially the contention that *Mullaney* applied to his situation. The Supreme Court of North Carolina agreed, but the reward for advancing the law goes only to those who follow. That petitioner would be granted such a benefit when it was denied others, whose cases had similar standing in point of time, would be "an unavoidable consequence of the necessity that constitutional adjudication not stand as mere dictum." *Stovall v. Denno*, 388 U.S. 293, at 301 (1967). Just as in *Stovall*, this narrow application of *Mullaney* to petitioner's case would support the principal that issues be resolved in concrete cases and would encourage appellants to pursue legitimate contentions requiring a change in the law. *Stovall v. Denno, Id.*, at 301.

CONCLUSION

Based upon the foregoing Arguments, petitioner asserts that the decision of the Supreme Court of North Carolina should be reversed and petitioner's case remanded to the Superior Court of Nash County, North Carolina for a new trial.

Respectfully submitted,

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Supreme Court, U. S.
F I L E D
DEC 16 1976
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 75-6568

JOHNNIE B. HANKERSON,
Petitioner,

v.

THE STATE OF NORTH CAROLINA,
Respondent

BRIEF FOR RESPONDENT

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IN THE
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No. 75-6568

JOHNNIE B. HANKERSON,
Petitioner,

v.

THE STATE OF NORTH CAROLINA,
Respondent

BRIEF FOR RESPONDENT

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment XIV:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTION PRESENTED

Did the Supreme Court of North Carolina deny the Petitioner due process of law when it declined to apply *Mullaney v. Wilbur*, 421 U.S. 684 (1975) to Petitioner's trial because it took place prior to June 9, 1975?

STATEMENT OF THE CASE

Petitioner shot Gregory Ashe in the heart on the evening of September 29, 1974, around 11:00 P.M. He has never denied the shooting or that there was sufficient evidence developed by the prosecution to establish this fact.

From the beginning, Petitioner has maintained this homicide was not unlawful but, rather, it was justified and excusable because it was done in self defense.

Upon an information, agreed to by Petitioner and counsel, charging him with second degree murder, Petitioner was duly prosecuted on this charge at the November 18, 1974, Session of the Nash County, North Carolina, Superior Court by the District Attorney in a trial to a jury of twelve. Petitioner put on a vigorous defense through cross-examination of the prosecution's witnesses, his own testimony and the testimony of others.

At the end of all the evidence, the trial judge gave the jury elaborate instructions on all elements of the crime and the manner in which the burden of proof was to be allocated. These instructions were in full accord with the North Carolina law as it existed at the time of the trial. The trial judge told the jury it could return one of the three possible verdicts: Guilty of second degree murder; Guilty of voluntary manslaughter or Not Guilty.

The jury rendered its unanimous verdict of guilty of second degree murder in open court.

There is no contention by Petitioner here that the evidence was insufficient to support the verdict.

Following appropriately determined North Carolina law, Petitioner was sentenced to not more than 25 nor less than 20 years imprisonment.

Petitioner, upon review by the North Carolina Court of Appeals, claimed the evidence, as a matter of state law, was insufficient to take the case to the jury. He also asserted there were certain errors in the admission of evidence and in the

trial judge's charge on the elements of self defense.

The North Carolina Court of Appeals, in a three to two decision, rejected Petitioner's contentions and affirmed his conviction and sentence. Because there was a dissent in the Court of Appeals, Petitioner had an appeal as a matter of right to the North Carolina Supreme Court.

Petitioner, upon review by the Supreme Court of North Carolina, in addition to the matters asserted in the Court of Appeals, claimed that the trial judge erroneously allocated the burden of persuasion by requiring him to "satisfy" the jury on the issue of self-defense. The Supreme Court rejected his contentions and affirmed his conviction and sentence.

On October 4, 1976, this Court granted Petitioner's petition for a writ of certiorari to the North Carolina Supreme Court to review that decision as it related to the question of the allocation of the burden of proof.

Further detailed statements of the evidence can be found in Petitioner's Brief and the opinion of the North Carolina Supreme Court. For the sake of brevity, they will not be repeated.

HOW THE CONSTITUTIONAL QUESTIONS WERE PRESENTED AND DECIDED BELOW

Petitioner raised the constitutional issue in a motion filed with the North Carolina Supreme Court on August 19, 1975, to amend the record to note additional Exceptions and Assignments of Error to the trial judge's instructions to the jury which would present for review additional questions suggested in the case of *Mullaney v. Wilbur*, 421 U.S. 684 (1975). The precise question, as stated by Petitioner in his motion below, was:

> "That *Mullaney v. Wilbur* makes unconstitutional the North Carolina rule that the Defendant, to show a justifiable homicide, has the burden of proof to the satisfaction of the jury to establish the defense of self-defense."

SUMMARY OF ARGUMENTS

I and II

THE SUPREME COURT OF NORTH CAROLINA WAS CORRECT IN DECLINING TO APPLY *MULLANEY V. WILBUR* RETROACTIVELY BECAUSE THE INSTRUCTIONS GIVEN BY THE TRIAL COURT DID NOT SUBSTANTIALLY AFFECT THE RELIABILITY OF THE FACT-FINDING PROCESS.

This case does not require automatic retroactivity because jury instructions relating to the allocation of the burden of proof of affirmative defenses do not substantially impair the truth-finding aspect of a criminal trial so as to raise serious questions about the accuracy of guilty verdicts in past trials. Rather, the misallocation of this burden raises only a probability of an incorrect verdict; accordingly, the extent of the reliance on the former rules and the effect on the administration of justice can also be considered. When these other factors are considered, as was done by the North Carolina Supreme Court, prospective application of the new doctrine is the correct result. Limited retroactivity to the case because it was still on direct appellate review is not required.

III

THE LAW OF NORTH CAROLINA COMPORTS WITH THE STANDARDS ANNOUNCED IN *MULLANEY V. WILBUR* AND THE SUPREME COURT OF NORTH CAROLINA ERRED IN APPLYING THESE STANDARDS PROSPECTIVELY.

The North Carolina law required a defendant in a homicide prosecution to prove to the "satisfaction" of the jury his affirmative defense of either heat of passion or self defense. This standard is not as high as the "preponderence of the evidence" standard found to be impermissible in *Mullaney v. Wilbur*. In actuality, all the North Carolina standard requires is that the defendant raise a reasonable doubt in the minds

of the jury. The North Carolina standard provides a desirable and effective means for the trial judge to bring forcefully the defendant's evidence to the jury so that it will carefully consider them.

ARGUMENT

I

THE SUPREME COURT OF NORTH CAROLINA WAS CORRECT IN DECLINING TO APPLY *MULLANEY V. WILBUR* RETROACTIVELY BECAUSE THE INSTRUCTIONS GIVEN BY THE TRIAL COURT DID NOT SUBSTANTIALLY AFFECT THE RELIABILITY OF THE FACT-FINDING PROCESS.

The petitioner in his brief argues, in substance, that the North Carolina Supreme Court erred by refusing to give automatic retroactive effect to the new constitutional due process doctrine announced in *Mullaney v. Wilbur*, 421 U.S. 684 (1975), which prohibits a state from requiring a defendant in a criminal prosecution to prove by a preponderance of the evidence certain affirmative defenses such as heat of passion on sudden provacation or self-defense. He argues this new doctrine, because it substantially impairs the reliability of the fact-finding process, falls within the purview of those cases from this Court which require automatic retroactivity. This being so, according to his argument, the balancing test used in other cases decided by this Court and applied by the North Carolina Supreme Court should not have been considered controlling and it was, therefore, error for the North Carolina Court to have considered the reliance on past decisions and the impact retroactivity would have on the administration of justice in North Carolina and other states with similar rules. The State of North Carolina disagrees with this argument.

A

IN GENERAL

There appear to be two lines of analysis used by this Court in reaching a decision as to whether a new constitutional

doctrine will be fully retroactive or merely prospective. One line states that new rules intended primarily to insure an accurate determination of facts are automatically to be enforced retroactively.[1] Conversely, if the major purpose of the new doctrine is perceived not to be to enhance the judicial truth-finding function, retroactivity is typically denied.[2]

In the other line of analysis, the purpose of the new rule is not considered dispositive. Rather, a balancing test is used to examine the probability that past trials have resulted in inaccurate guilty verdicts.[3] Using this approach "(t)he question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact finding process at trial is necessarily a matter of degree."[4] The cases reason that the old rule may not have been the cause of a guilty verdict and they reject "the premise that every criminal trial, or any particular trial, was necessarily unfair because it was not conducted in accordance with what we determined to be the requirements of (the constitution)."[5] In this line of cases the question of whether the old rule infected the fact-finding process is viewed as a "question of probabilities"[6] and thereby avoids the "automatically retroactive" line of analysis. Once this analysis is chosen a "balancing approach," is used,[7] weighing three factors: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."[8] In this line of cases, "the purpose to

1 Ivan V. v. City of New York, 407 U.S. 203 (1972) (per curiam), Williams v. United States, 401 U.S. 646 (1971), Arsenault v. Massachusetts, 393 U.S. 5 (1968) (per curiam)

2 e.g., Fuller v. Alaska, 393 U.S. 80 (1968) (per curiam); Linkletter v. Walker, 381 U.S. 618 (1965).

3 e.g., Daniel v. Louisiana, 420 U.S. 31 (1975) (per curiam); Adams v. Illinois, 405 U.S. 278 (1972); De Stefano v. Woods, 392 U.S. 631 (1968) (per curiam)

4 Johnson v. New Jersey, 384 U.S. 719, 728-29(1966)

5 Daniel v. Louisiana, supra at 32.

6 Johnson v. New Jersey, supra supra at page 729

7 Lemon v. Kurtzman, 411 U.S. 192, 199 (1973)

8 Stovall v. Denno, 388 U.S. 293, 297 (1967)

be served by the new constitutional rule" will not automatically decide retroactivity, but it is merely "(f)oremost among these factors."[9]

It is not always clear which line of analysis will be chosen in a given case.[10] For rules intended primarily and perhaps solely to insure a more just determination of facts, this Court has sometimes invoked the "matter of degree" formula rather than the ostensibly more appropriate "automatically retroactive" analysis. Such was the result in *De Stefano v. Woods, supra* in which it was held the *Duncan v. Louisiana*, 391 U.S. 145 (1968) rule, which incorporated the right to a jury trial for serious criminal offense, non-retroactive. *De Stefano* also made *Bloom v. Illinois*, 391 U.S. 194 (1968), which required a right to jury trial for serious criminal contempts, valid prospectively only. The rationale for holding a new rule which changes the trier of fact retroactive must be that a different fact-finder might arrive at a more reliable result.[11] In denying retroactivity, it was assumed that many trials by judges were as fair as if tried by juries and the conclusion was that since the results might have been identical, an analysis of the other factors affecting retroactivity was in order.[12] On the other hand, it appears that the "matter of degree" formula has been ignored in other cases where the trier of fact might or might not have reached a different result had the new standard been in force. In *Ivan V. v. City of New York, surpa*, for example it was noted that an obvious fact-finding purpose was served by substituting the reasonable

9 Desist v. United States, 394 U.S. 244, 249 (1969)

10 Cases that seem to belong in one category are often treated oppositely. Thus McConnell v. Rhay, 393 U.S. 2 (1968) (per curiam), using the absolutist approach, held the right to counsel at the imposition of a deffered sentence to be retroactive while the later case of Adams v. Illinois, supra, using the balancing approach, held the requirement of counsel at a preliminary hearing to be non-retroactive.

11 391 U.S. at 158.

12 392 U.S. at 633-34.

doubt standard for the preponderance of the evidence test in juvenile proceedings for offenses equivalant to a crime.[13] Consequently, *Ivan V.* disposed of the matter with a recital of the "automatically retroactive" line of cases.[14]

In the context of the above, therefore, the State of North Carolina argues that the "automaticially retroactive" line of cases do not apply and that the "matter of degree" or "balancing" line of cases applies because, as noted hereafter, the new doctrine as to burden of proof for affirmative defenses may not produce a dramatic improvement in the fact-finding process.

In this context, the State will now turn to an analysis of the three factors of purpose, reliance and impact.

B

THE PURPOSE FACTOR

As both this Court and the North Carolina Supreme Court have recognized, the purpose of a rule which is deemed to improve the reliability of the fact-finding process will be given the greatest weight in the retroactivity consideration. When it is concluded a new doctrine will improve the fact-finding process, it will often be given retroactive effect because it may disclose that an otherwise innocent person was convicted in the past because the fact-finding process was unreliable.

Prejudice by the finder of fact is less inherent under the North Carolina rules than in *Ivan V.* or *Winship*. Presumably all of the juvenile defendants made eligibile for retrial in *Ivan V.* were again tried before judges. All contested homicide trials

13 Ivan V. held In re Winship, 397 U.S. 358 (1970) retroactive. In these cases, guilt as to all elements of the offense was to be arrived at by the preponderance of the evidence test. The reasonable doubt standard was never applied and a possible harmless error analysis could not be considered.

14 In this area, see the comments of Ostrager, Retroactivity and Prospectivity of Supreme Court Constitutional Interpretations, 19 N.Y. L F. 289 (1973) and a comment in 54 N.C. L. Rev. 1020 (1976)

in North Carolina are before juries.[15] The complicated instructions required by North Carolina law might well, as Justice Lake suggested in his concurring opinion in the case, have resulted in harmless error.[16] Unable to follow the shifting burden in the homicide instructions, juries in the past might well have heeded the apparently overriding instruction to convict only if convinced of guilt beyond a reasonable doubt.[17] Unwilling to convict without proof beyond a reasonable doubt, former juries might have refused to do so thus nullifying the instruction.[18] An exhaustive study has shown that juries often disregard the harshness of rules of law especially in judging self-defense claims.[19] The probability of misunderstanding, of treating to its "satisfaction" to mean "to raise a reasonable doubt" or of nullification of the former instruction by a jury seems to be much higher than that of a judge confusing the standards in pre- *Winship* cases. Thus, there seems to be a lower probability that a defendant was wrongfully convicted under the North Carolina instructions than in the *Winship* situation or under the instructions given by the Maine Court in *Mullaney*.

In summary, as shown above the North Carolina jury instructions do not demand a "per se" or "automatically retroactive" result because of the purpose factor.

15 N.C. Constitution, Art. I., Sec. 24 "*Right of jury trial in criminal cases*. No person shall be convicted of any crime but by the unaminous verdict of a jury in open court."

16 288 N.C. at 659-60, 220 S.E. 2d at 594, A. 40. This analysis is more fully developed in Argument III following.

17 See the study on jury perceptions of trial judge's instructions in Gordon & . merlin, *Forensic Psychology: The Judge and the Jury*, 52 JUDICATURE 328, (1969)

18 H. KALVEN & H. ZEISEL, THE AMERICAN JURY, 182-90 (1966) (juries have a higher standard of "beyond a reasonable doubt" than do judges and are less likely to convict.

19 Ibid.

C

THE RELIANCE FACTOR

Until the decision in *Mullaney*, there was absolutely no hint from this Court in its prior decisions that the states were not free to place some burden of proof as to affirmative defense on a defendant in a criminal trial. The early case of *Davis v. United States*, 160 U.S. 469 (1895) was limited to questions of insanity in criminal prosecutions in federal Courts. The later case of *Leland v. Oregon*, 343 U.S. 790 (1952), held that an Oregon rule placing the burden of proof on the defendant to prove insanity beyond a reasonable doubt comported with due process and again explicitedly limited *Davis* to the federal courts. And the intervening case of *Morrison v. California*, 291 U.S. 82 (1934), held that the burden of persuasion on an issue in dispute may be shifted to the defendant when the prosecution has made out a case that "has at least a sinister significance"[20] so as to justify forcing the defendant to negate or establish an excuse or explanation for what has been proved. *In Re Winship*, did not purport to deal with affirmative defenses; the due process violation there was the lack of *any* reasonable doubt standard in juvenile trials in New York. Until *Mullaney*, therefore, the states were free to allocate the burden of proof in criminal prosecutions in any manner they deemed wise. In reliance on this fact North Carolina allocated to the defendant the burden, in homicide prosecutions, of satisfying the jury as to heat of passion and self defense.

Moreover, as the North Carolina Supreme Court noted in its opinion, the North Carolina rules have been firmly settled for well over one hundred years and they were firmly rooted in Common Law procedures.[21]

The State of North Carolina submits that the reliance factor clearly militates in favor of non-retroactivity. Accordingly, the North Carolina Supreme Court was entirely correct in this aspect of its opinion.

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20 291 U.S. at page 90

21 288 N.C. at 654, 220 S.E. 2d at 590, A.38.

D

THE IMPACT FACTOR

The Supreme Court of North Carolina identified, as of June 30, 1975, 269 inmates in its Department of Corrections who had been convicted of first degree murder and 728 inmates who had been convicted of second degree murder.[22] If *Mullaney* is held retroactive, potential retrials might be required in those second degree murder cases where the defendant raised an affirmative defense of either heat of passion or self-defense.[23] It would not, obviously, apply to those cases where the defendant entered a guilty plea or relied on any other defense than heat of passion or self-defense.[24] The statistics available do not permit identification of the numbers involved in the suspect category. Retrial of these unknown numbers would put a considerable burden on the State of North Carolina.

More significantly, however, would be the impact of a retroactive application on other states. The North Carolina Supreme Court, in its opinion, noted that at least fifteen jurisdictions require the defendant in a homicide prosecution to carry the burden of persuasion for self-defense or heat of passion.[25] Two of those fifteen, Ohio and Pennsylvania, and three others not included in the fifteen, Illinois, Kentucky and Missouri, put the burden on defendants for one or both issues

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22 288 N.C. at 654, 220 S.E. 2d at 591, A. 38.

23 It would seem, in light of the exhaustive analysis of Evans v. State, 349 A. 2d 300 (Md. App. 1975), that first degree murder convictions would not be affected by Mullaney since the elements of premeditation and deliberation would have been proved beyond a reasonable doubt and thus render any Mullaney error harmless beyond a reasonable doubt. 349 A. 2d at 12-20.

24 North Carolina has never put any burden, other than the production burden, on the defendant in regard to alibi. See, e.g. State v. Minton, 234 N.C. 716, 68 S.E. 2d 844, 31 A.L.R. 2d 682 (1952)

25 288 N.C. at 654-55; 220 S.E. 2d at 591, A. 39.

in assault cases.[26] The number of persons who would benefit from retroactive application of *Mullaney* in these other states would thus seem to be higher than in North Carolina, which has never shifted the burden in assault cases.[27] Futhermore, if the *Mullaney* principle is to be extended to other affirmative defenses, other states, including North Carolina, might face retrial of large numbers of convicted felons.[28]

The potential impact of a retroactive application of *Mullaney* would be great indeed.

ARGUMENT

II

THE SUPREME COURT OF NORTH CAROLINA WAS CORRECT IN DENYING LIMITED RETROACTIVITY TO *MULLANEY*.

The Petitioner argues here that since his case was on direct appeal as a matter of right on the date that *Mullaney v. Wilbur* was decided the North Carolina Supreme Court should have given him the benefit of its doctrine and ordered a new trial. The State disagrees and argues its Supreme Court was entirely correct in denying limited retroactivity.

Initially, it should be noted the case is before this Court, as it was before the North Carolina Supreme Court, in a

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26 Shepherd v. Commonwealth, 306, 306 Ky. 121, 206 S.W. 2d 485 (1947); State v. Davis, 342 Mo. 594, 116 S.W. 2d 110(1938); State v. Powers, 98 Ohio App. 365, 129 N.E. 2d 653, appeal dismissed, 162 Ohio St. 431, 123 N.E. 2d 406 (1954); Commonwealth v. Noble, 371 Pa. 138, 88 A. 2d 762 (1952). See generally 6A C.J.S. Assault & Battery §115 (1975).

27 State v. Warren, 242 N.C. 581, 189 S.E. 2d 109(1955)

28 Several recent commentators have advocated such an extension. Sec, e.g., 11 Harv L. Rev. 429 (1976) and 27 Syracuse L. Rev. 834 (1976). North Carolina also puts the burden of proof to the "satisfaction of the jury" on defendants who assert entrapment, State v. Cook, 263 N.C. 730, 140 S.E. 2d 305 (1965) or mistake of fact N.C. PATTERN INSTRUCTIONS CRIM. 306.10(Mar. 1975). The numbers in these categories are unknown.

somewhat peculiar procedural posture. The case was tried at the November 11, 1975, Session of the Nash County, North Carolina, Superior Court. (A. 1) Judgment was entered by the trial judge on November 21, 1974. (A. 1) The case was argued orally in the North Carolina Court of Appeals on May 29, 1975. (A. 1) At this point in time no one involved in the case could have known that about two weeks later, on June 9, 1975, *Mullaney v. Wilbur*, would be announced establishing a new constitutional due process standard applicable to the the states concerning the placement burden of proof as to affirmative defenses in homicide prosecutions. At the time the case was tried, appealled, briefed and argued in the first appellate court level, no error in applying the State allocation of the burden of proof existed which could have been made the basis of an exception and assigned as error. So also, there was no federal constitutional doctrine applicable to the states which would have required the trial judge to allocate the burden of proof differently than was actually done in his instructions. Because of the lack of any overriding federal constitutional standard, the trial judge correctly applied the longstanding North Carolina rules and the Petitioner quite properly took no exception thereto.

The Court of Appeals filed its decision and opinion in the case July 16, 1975, slightly over a month after the *Mullaney* decision was announced on June 9, 1975. The North Carolina Court of Appeals did not consider the new *Mullaney* doctrine in its opinion because no such question was presented to it by the Petitioner in his brief or in his exceptions and assignments of error set forth in the record before the Moreover, Petitioner, after the date *Mullaney* was announced, never moved before the Court of Appeals for leave to amend the record to reflect additional exceptions and assignments of error as to the incorrect allocation of the burden of proof, and for the opportunity to file additional briefs and oral argument. Not having the issue before it, the Court of Appeals, filed its majority opinion along with the dissent by Judge Arnold on the issue of the sufficiency of the evidence. This issue was, of course, raised by the Petitioner before that court; in fact, it was his major contention. The dissent on a question unrelated to any *Mullaney* problems was what created the right of direct appeal to the Supreme Court of North Carolina. N.C.Gen. Stat. 7A-30(2).

It was only after the Notice of Appeal was filed that Petitioner, for the first time, on August 19, 1975, moved for leave to amend the record on appeal to raise *Mullaney* issues. (A. 2) The Supreme Court granted this motion on September 2, 1975, eight days before oral argument on the case September 10, 1975. (A. 2)[29]

This background, of course, is not determative of the issue of whether the new doctrine should have been applied because the case was still on direct appellate review as a matter of right. The State of North Carolina argues that the later decisions of this Court in no way require application of new constitutional doctrines to cases which are still pending on direct appellate review as a matter of right. Thus in *Desist v. United States*, supra, this Court refused to apply the doctrine announced in *Katz v. United States*, 389 U.S. 347 (1957), to petitioner *Desist* even though his case was still pending on direct appellate review at the time. *Desist* gave *Katz* a completely prospective operation Rejecting the Petitioner's argument for limited retroactivity as to him because his case was still pending on direct appellate review on the date *Katz* was decided, the Court noted:

> "Petitioners point out that in Linkletter, the only other case involving the retroactivity of a Fourth Amendment decision, the Court held Mapp applicable to every case still pending on direct review on the date of that decision A similar approach was adopted in Tehan v. Shott, 382 U.S. 406, with respect to the prospectivity of Griffin v California, 380 U.S. 609. In Johnson v. New Jersey, 384 U.S. 719, however, we abandoned the approach taken in Linkletter and

29 The State has no quarrel with the way the case and issues were handled in the state appellate process. Manifestly, Petitioner's counsel probably did not learn of Mullaney and realize its significance until after the Opinion of the Court of Appeals was filed. Realizing he had an appeal as a matter of right, he promptly raised the issue then. The Supreme Court, anxious to give guidance to trial judges, seized this case as an appropriate vehicle to do so.

> Tehan and concluded that 'there are no jurisdictional or constitutional obstacles' to the adoption of a different cut-off point. Id. at 733'. "[30]

Further in the same opinion, it was noted "(a)ll of the reasons for making Katz retroactive also undercut any distinction between final convictions and those still pending on review."[31] and "(n)or can it be sensibly be maintained that the Court is foreclosed by Linkletter in this case, as it was not in Johnson, simply because Katz, like Mapp, was a Fourth Amendment decision."[32] To the same effect is *Kaiser v. New York*, 394 U.S. 280 (1969). Both of these cases were relied on by the North Carolina Supreme Court in its opinion.[33]

From these decisions as well as *Michigan v. Payne*, 412 U.S. 47 (1973), which held it to be error for a state court to apply a decision of this Court retroactively when later this Court determined the decision to be prospective only, it seems clear that even limited retroactivity is not compelled.[34] These same cases would also seem to deny limited retroactive application of the *Mullaney* doctrine to the unknown numbers of other cases which were on direct appeal on June 9, 1975, in North Carolina.

ARGUMENT

III

THE LAW OF NORTH CAROLINA CONCERNING THE BURDEN OF PROOF TO BE PLACED ON DEFENDANTS IN HOMICIDE

30 394 U.S. at 252.
31 Id. at 253.
32 Id. at 253.
33 288 N.C. at 652, 220 S.E. 2d at 590, A. 36.
34 Obviously, if Mullaney is held to be retroactive by this Court, then the Supreme Court of North Carolina would have been wrong in its prospectively only ruling. In the decisions to date, however, there is nothing which requires a holding of limited retroactivity on this case until a ruling is made deciding the retroactivity or prospectivity of Mullaney.

PROSECUTIONS WHO ASSERT AFFIRMATIVE DEFENSES OF HEAT OF PASSION AND SELF DEFENSE FULLY COMPORTED WITH THE DUE PROCESS STANDARDS ANNOUNCED IN *MULLANEY V. WILBUR* AND ITS SUPREME COURT ERRED IN HOLDING THIS LAW PROSPECTIVELY INVALID.

The longstanding rules in North Carolina regarding the burden of proof imposed on the defendant in affirmative defenses of heat of passion or self-defense require him to establish these defenses to the satisfaction of the jury. What is meant by satisfying the jury has never been clearly defined although, as developed by the following analysis and recognized by the Supreme Court of North Carolina in *Hankerson*,[35] it has never required proof by a preponderence of the evidence. The State of North Carolina argues that it merely requires the defendant to raise a reasonable doubt. If all it requires is that the defendant raise a reasonable doubt then it would seem to comport with the due process standards announced in *Mullaney* which finds nothing constitutionally impermissible in requiring a criminal defendant to bear the burden of producing some evidence sufficient to raise a reasonable doubt.[36]

The North Carolina Supreme Court's Construction and definition of the meaning of the term "satisfaction of the jury" does not preclude the State of North Carolina from making this argument.[37] As construed in *Hankerson*, "(s)atisfying the jury . . . means . . . a standard no greater and at the same time one not significantly less than persuasion by a preponderance of the evidence. Satisfying the jury means that there must be some evidence offered of all elements of heat of passion on sudden provocation or of self-defense, as the case

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35 288 N.C. at 648, A. 32.

36 421 U.S. at 703, n. 31.

37 Ordinarily, the state court's definition of its law will be biding, e.g., Winters v. New York, 333 U.S. 507 (1948) except in extreme circumstances. Bowe v. City of Columbia, 378 U.S. 347 (1964).

may be, and that this evidence must satisfy or persuade the jury of the truth of the existence of these provocations - one which robs the crime of malice and the other which excuses it altogether."[38] It can be seen that as construed, the concept requires the defendant to bear the production burden on all elements of the two affirmative defenses sought to be established. As construed, it also puts some persuasion burden on the defendant. It is the extent of the persuasion burden that is crucial.

The question then becomes did the North Carolina instructions, by telling the jury that it must be satisfied that the petitioner acted in the heat of passion on sudden provocation or in self-defense, impermissibly relieve the prosecution of its burden of proving malice and unlawfulness and place this burden of persuasion as to the non existence of these elements on the Petitioner. To resolve this question, an examination of what is meant by telling the jury, in accordance with the long settled North Carolina rule, that it must be satisfied is required

This language as used in the instructions given here does not mean the jury must be persuaded by a preponderance of the evidence that malice does not exist, that the heat of passion on sudden provocation does exist, or that the elements of self-defense do exist. The Maine jury instructions found wanting in *Mullaney* clearly placed upon the defendant the burden to show that it is more probable than not, or by a fair preponderance of the evidence, that the defendant killed in the heat of a sudden passion. Maine followed the landmark case of *Commonwealth v. York*, 9 Met (50 Mass.) 93 (1845). This Court seems to have regarded this aspect of the Main jury instruction as being primarily offensive when it observed:

> "Under this burden of proof a defendant can be given a life sentence when the evidence indicates that it is *as likely as not* that he deserves a significantly lesser sentence. This is an intolerable result. . . ."[39]

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38 288 N.C. at 648, A. 32.

39 Mullaney v. Wilbur, supra at 703.

The North Carolina burden of proof on a defendant to show heat of passion or self-defense is decidedly and purposefully different in that the quantum of proof is simply to the "satisfaction" of the jury–not by the greater weight of the evidence nor beyond a reasonable doubt. *State v. Freeman*, 275 N.C. 662, 170 S.E. 2d 461 (1969). This standard was not invented by North Carolina. It was standard recognized by expositors of the common law:

> "(W)e may take it for a general rule that all homicide is malicious, and of course amounts to murder, unless where *justified* by the command or permission of the law; *excused* on the account of accident or self-preservation; or alleviated into manslaughter, by being either the involuntary consequence of some act, not strictly lawful, or (if voluntary) occasioned by some sudden and sufficiently violent provocation. And all these circumstances of justification, excuse, or alleviation, it is incumbent upon the prisoner to make out, "to the satisfaction of the court and jury" (Emphasis supplied): the latter of whom are to decide whether the circumstances alleged are proved to have actually existed; the former, how far they extend to take away or mitigate guilt. For all homicide is presumed to be malicious, until the contrary appeareth upon evidence." 4 W. Blackstone Commentaries *201.

As noted in *Mullaney*,

> "In a landmark case, *Commonwealth v. York*, 9 Met (50 Mass) 93 (1845) Chief Justice Shaw of the Massachusetts Supreme Judicial Court held that the defendant was required to negate malice aforethought by proving by a preponderance of the evidence that he acted in the heat of passion."[40]

This Court rejected *York's* rule for use in federal courts in *Davis v. United States, supra*, giving this reason:

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40 Id. at 694.

> "We are unable to assent to the doctrine that in a prosecution for murder, the defense being insanity, and the fact of the killing with a deadly weapon being clearly established it is the duty of the jury to convict where the evidence is *equally balanced* on the issue as to the insanity of the accused at the time of the killing."[41]

This was precisely the reason given 80 years later in *Mullaney*.

North Carolina has never followed *York*; rather, proceeding along the lines of the dissent in *York* and the later case of *Commonwealth v. Hawkins*, 3 Gray (69 Mass.) 463 (1855). In *State v. Ellick*, 60 N.C. 450 (1864) it was held that a defendant need not make out his affirmative defense or matters in mitigation beyond a reasonable doubt but simply to the satisfaction of the jury. In *State v. Willis*, 63 N.C. 26 (1868) the North Carolina Court considered *York* and explicitly rejected that portion of the *York* opinion which placed the burden on the defendant to make out his affirmative defense or matters in mitigation by a preponderance of the evidence, noting:

> "We prefer to stand *super antiquas vias*, and to adhere to the rules laid down in the *State v. Ellick*, above referred to. In that case the erroneous statement which we had inadvertently made in the *State v. Peter Johnson*, (48 N.C. 266 (1855)) that it was incumbent on the prisoner to establish the matters of excuse or extenauation beyond a reasonable doubt, is corrected. In it is also corrected what we consider as erroneous in the decision of the Court in *Commonwealth v. York*, that the matters of excuse or extenuation which the prisoner is to prove, must be decided according to the preponderance of evidence. It is more correct to say, as we think, that they must be proved to the satisfaction of the jury."[42]

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41 160 U.S. at 484 (Emphasis added)

42 63 N.C. at 29

Although there has been *language* in several of the later North Carolina cases to the contrary, Stansbury's North Carolina Evidence § 214, n. 48 (Brandis Rev. 1973), e.g., *State v. Freeman, supra*, it *has held* that the burden on the defendant is not by the preponderance of the evidence, *State v. Barrett*, 132 N.C. 1005, 43 S.E. 832 (1903), nor any greater standard, *State v. Freeman, supra. State v. Carland*, 90 N.C. 668 (1884), holding to the contrary, erroneously purported to follow *Willis* and was overruled *sub silentio* in *State v. Barrett, supra*.

In *Barrett* the judge's instruction on burden of proof was basically that used in Maine. Although reversing for other errors, this aspect of the charge was strongly criticized as not in accord with prior cases, the court saying:

> "(T)he prisoner must satisfy the jury, neither beyond a reasonable doubt nor yet by a preponderance of testimony, but simply satisfy them, of the existence of facts and circumstances which mitigate the offense or which make good a plea of self-defense."[43]

"Satisfying" the jury of the existence of certain facts therefore does not mean that defendant must prove their existence by a preponderance of the evidence.

Accordingly, the crucial difference between the jury instructions given here and those given in Maine which were struck down in *Mullaney* are: upon proof beyond a reasonable doubt of an assault with a deadly weapon resulting in death, and the unlawfulness of the killing, and evidence of all elements of heat of passion on sudden provocation a jury under the Maine instructions would be required to return a verdict of guilty of murder unless it could find *affirmatively* by a preponderance of the evidence that the killing was done in the heat of passion on sudden provocation; whereas under the approved instructions in North Carolina even if no such *affirmative* finding was made the jury could not return a verdict of guilty of murder in the second degree unless the State, aided by the inference of malice arising from the use of a deadly weapon, proved malice beyond a reasonable doubt. Thus it can be concluded that the defendant's burden to "satisfy" the jury

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43 132 N.C. at 1013.

of the jury of the existence of heat of passion taken in the context of the entire instruction means only that the evidence of heat of passion on sudden provocation must be sufficient to raise a reasonable doubt in the minds of the jury as to the existence of malice. This conclusion is required in order to give appropriate effect to those portions of the instructions which unequivocally and repeatedly place upon the State the burden to prove malice beyond a reasonable doubt. Likewise inasmuch as the State here was required to prove the absence of justification or excuse, i.e., unlawfulness beyond a reasonable doubt, the defendant's burden to "satisfy" the jury of the existence of self-defense means only that the evidence of self-defense must be sufficient to raise a reasonable doubt as to the existence of unlawfulness.

While the terminology of these instructions may allocate some burden of persuasion to defendant it does not follow that the allocated burden is therefore constitutionally impermissible. This Court recognized in *Mullaney v. Wilbur, supra*, n. 20, that the North Carolina rules have "blurred the distinction between" the production burden and the persuasion burden. Any so called blurring does not arise from failure to recognize the difference between producing evidence and persuading the jury but rather from the constitutional insignificance of the distinction between requiring a defendant to produce evidence which is capable of belief by a jury and which tends toward innocence or mitigation (tacitly approved in *Mullaney*), and requiring him to persuade a jury that there is a "doubt based on reason and common sense arising out of some or all of the evidence that has been presented, or lack of evidence as the case may be, as to any fact necessary to constitute (his) guilt."

While there may be words in the instruction such as "if you find that the defendant acted . . . in self-defense, he would not be guilty" and "the defendant must satisfy you" which, isolated, might seem to place some burden of proving affirmatively the presence of self-defense or heat of passion, when placed in contex of other pertinent provisions of the instructions, they do not. *See Cupp v. Naughten*, 414 U.S. 141 (1973). *Cupp* arose from an Oregon criminal prosecution in which the defendant put on no evidence. Twice the court charged that the defendant was presumed innocent until proven

guilty beyond a reasonable doubt. The judge also charged on an Oregon permissive inference that witnesses were presumed to speak the truth. Defendant claimed this latter instruction impinged unconstitutionally on the presumption of innocence and the prosecution's burden of proof beyond a reasonable doubt. In rejecting the claim this Court said:

> "Certainly the instruction by its language neither shifts the burden of proof nor negates the presumption of innocence accorded under Oregon Law. It would be possible perhaps as a matter of abstract logic to contend that any instruction suggesting that the jury should believe the testimony of a witness might in some tangential respect 'impinge' upon the right of the defendant to have his guilt proved beyond a reasonable doubt. But instructions bearing on the burden of proof, just as those bearing on the weight to be accorded different types of testimony and other familiar subjects of jury instructions, are in one way or another designed to get the jury off dead center and to give it some guidance by which to evaluate the frequently confusing and conflicting testimony which it has heard. The well-recognized and long-established function of the trial judge to assist the jury by such instructions is not emasculated by such abstract and conjectural emanations from *Winship*." Id. at 148-149.

So in this case, even if those challenged portions of the instruction, in isolation, may "as a matter of abstract logic . . . impinge on the right of the defendant to have his guilt proved beyond a reasonable doubt," taken in context of the full charge they are designed simply, and constitutionally, to guide the jury in evaluating whether the State has proven guilt beyond a reasonable doubt. It was this aspect of the North Carolina instructions which were not fully considered by its Supreme Court in its opinion.

Not only do these instructions comport with the Due Process Clause of the Fourteenth Amendment, they also enunciate principles that are supported by compelling policy considerations. The reasonable doubt standard in criminal cases

is erected in favor of the life and liberty of innocent defendants. To place no burden on a criminal defendant charged with homicide to raise even a reasonable doubt as to the existence of malice or unlawfulness upon proof that he intentionally shot another person which shooting proximately resulted in that person's death would be to favor death to the victim and injustice to the State. This is so because a homicide victim can never himself shed light on the circumstances surrounding the killing. One can think of no rule which would more inevitably lead to undersirable results that one which requires instructing a jury that it must acquit a homicide defendant who produces some evidence of mitigation or justification whether or not that evidence is enough or "satisfies" it that there is a reasonable doubt as to malice or unlawfulness. Giving the defendant the burden of raising a reasonable doubt is an approved rule in a number of jurisdictions. *DeGrott v. United States*, 78 F2d, 244, 251 (9th Cir. 1935) (synthesizing *Davis v. United States, supra*, and *Matheson v. United States*, 227 U.S. 540 (1913)); *Spence v. Territory*, 13 Ariz. 20, 108 P. 227 (1910); *Everett v. State*, 88 Ariz 293, 356 P. 2d 394 (1960); *State v. Dill*, 282 S.W. 2d 456 (Mo. 1955); *State v. Harrison*, 81 N.M. 623, 471 P. 2d 193 (Ct. App. 1970); *State v. Hazlet*, 16 N.D. 426, 113 N.W. 374 (1907); see annot., 43 A.L.R. 3d 221 (1972), especially §§ 3(f) and 4(b).

The preponderence of the evidence test used by Maine and a number of other jurisdictions required the jury, in the event their minds were evenly balanced between conviction and acquittal, to convict. This was the constitutionally impermissible part of the Maine instructions. By contrast the North Carolina standard allows the jury to acquit in the equally balanced situation. Conceivably, it could also result in acquittals when the balance might be tipped slightly in favor of the prosecution but not so far as to pass the beyond a reasonable doubt burden that is required to be repeatedly placed on the prosecution by the North Carolina law. By having no precise definition of the amount of evidence required to satisfy it, the jury is free to weigh the defendant's evidence in any manner it chooses; it is never required to find the defendant's evidence must preponderate or be evenly balanced to that opposed to it before any acquittal can result.

The same is true when the jury is told they can acquit if the prosecution has not proved its case beyond a reasonable

doubt. Again, the jury is left free to give whatever weight it deems appropriate to the evidence produced by the defendant in its sole and unbridled discretion. It seems there is nothing constitutionally impermissible in allowing juries or other fact-finders great lattitude in applying the "less than a reasonable doubt" standard nor in requiring defendant to produce sufficient evidence to raise a reasonable doubt. In any criminal trial conducted in North Carolina, the jury is always told the prosecution must prove its case beyond a reasonable doubt and that it must acquit if the prosecution fails to carry this burden. It is only in a fairly limited number of trials (homicide of less than first degree) that the "satisfaction" standard even comes into a trial. Thus, if the wide discretion allowed to the jury in all cases other than less than first degree homicide prosecutions comports with all due process notions, then surly similar wide discretion given to the jury by the "satisfaction" test would also pass constitutional muster.

Moreover, a rule of law which requires the trial judge to affirmatively instruct on the defendant's evidence so that the "satisfaction" test can be stated and applied benefits the defendant. First, the defendant's evidence is recapitulated and restated to the jury just before they retire to deliberate so that it is fresh on their mind. Second, they are told affirmatively that the law requires them to consider this evidence and that it cannot be ignored. Merely instructing that the prosecution must prove its case beyond a reasonable doubt or that an acquittal must be granted if the jury has a reasonable doubt puts the focus and emphasis on the prosecution's evidence or lack thereof and tends to relegate the defendant's evidence to a secondary role. In its deliberations, the jury may well ignore the defendant's evidence in its efforts to discern whether the prosecution's evidence meets the reasonable doubt standard. Thirdly, the jury is told it merely has to be satisfied by the defendant's evidence with no mention being made of any further requirement. Satisfaction is a word of ordinary usage as opposed to a word of art (such as "malice" or "reasonable doubt") whose meaning is clear to most people who would be sitting as jurors. Thus they are given a comprehensible standard to apply when considering the defendant's evidence. As a practical matter, unless the jury or other fact-finder is satisfied from the defendant's evidence of the truth of the existence of all the elements of either heat of passion or

self-defense (regardless of whatever formula the trial judge uses in his instructions) guilt will be found. Thus, in the final analysis, mere semantical differences in a trial judge's instruction result in few, if any, changes in ultimate result.

The State of North Carolina feels that the longstanding instructions requiring the jury to be "satisfied" fully comported with federal due process. The "fine tuning" of due process notions done by this Court in *Mullaney* involving rules in Maine should not work to invalidate North Carolina's markedly different rules. Until this Court, which is the only body which can authoritatively declare the reach of its decisions, says directly and unequovicably that North Carolina's rule violates due process as recently redefined in *Mullaney*, the North Carolina Supreme Court's interpretation and application of *Mullaney* is not dispositative of the question. Therefore, the State of North Carolina urges this Court to examine the applicability of the *Mullaney* standards to this state.

Furthermore the North Carolina Supreme Court, in its haste to remove any constitutionally suspect rules from its law, may have overlooked the recent admonitions from this Court of "the importance of allowing the States to experiment and innovate especially in the area of criminal justice." and "that neither the Constitution as orginally drafted, nor any amendment, nor indeed any need, dictates that we must have absolute uniformity in the criminal law in all the States".[44] By adopting the "satisfaction" test, which seemingly has worked well in North Carolina for over one hundred years, this state has in fact innovated and experimented. In all this time, this approach was never questioned. *Mullaney* has not questioned North Carolina's approach; rather, striking down a Maine rule which could have never survived even a moment's scrutiny by the North Carolina Courts.

For all of the above reasons, therefore, it is most earnestly submitted that the North Carolina Supreme Court erroneously perceived the sweep of *Mullaney* and thereby incorrectly applied it invalidate, albeit prospectively, a constitutionally acceptable standard.

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44 California v. Green, 399 U.S. 149, 171 (1969) (Chief Justice Burger concurring.)

CONCLUSION

To date, the decided cases of this Court do not require an automatically retroactive application of the new due process standards as to allocation of the burden of proof on the affirmative defenses of heat of passion on sudden provocation and self-defense. The three factor analysis of purpose, reliance and impact should be used to resolve the retroactivity question, when this is done, the reliance and impact factor outweigh the purpose factor and thereby require a prospective only application of the new due process standard.

In no event do the decided cases demand a limited retroactive application to the case because it was still on direct appellate review as a matter of right.

Finally, the Supreme Court of North Carolina may have been in error by holding that the new standard, even prospectively, had any application to the existing North Carolina Rules.

For these reasons, therefore, the State of North Carolina feels that the decision of its Supreme Court refusing to apply *Mullaney* retrospectively in any manner was entirely correct. The State further feels that the *Mullaney* doctrine should have never been applied since its rules fully comported with the new standard.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am admitted to practice law before the Supreme Court of the United States; that I have served copies of the within BRIEF FOR RESPONDENT by depositing three copies of same in the United States Mail at Raleigh, North Carolina, addressed to: Lawrence G. Diedrick, P. O. Box 2626, Rocky Mount, North Carolina 27801, first class postage prepaid.

This the 15th day of December, 1976.

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FOR ARGUMENT

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IN THE

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OCTOBER TERM, 1976

No. 75-6568

JOHNNIE B. HANKERSON,

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v.

THE STATE OF NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF NORTH CAROLINA

REPLY BRIEF OF PETITIONER

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CONSTITUTIONAL PROVISION INVOLVED
CONSTITUTION OF THE UNITED STATES, AMENDMENT *XIV*

"§. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTION PRESENTED

Should this Court review the North Carolina Supreme Court's definition of its law as it applies to proof to the "satisfaction of the jury"?

ARGUMENT

THE SUPREME COURT OF NORTH CAROLINA PROPERLY DEFINED AND INTERPRETED THE TERM "TO THE SATISFACTION OF THE JURY" AS IT RELATED TO THE LAW OF NORTH CAROLINA, AND THERE ARE NO EXTREME CIRCUMSTANCES WHICH WARRANT A REVIEW OF THAT DEFINITION AND INTERPRETATION BY THIS COURT.

In the brief of the respondent (Argument III, p. 15), respondent argues at length, as it did in its brief in opposition to the Petition for Writ of Certiorari, that the Supreme Court of North Carolina erred in holding that by reason of the decision in *Mullaney v. Wilbur* 421 U.S. 684 (1975) the due process clause prohibits the use of North Carolina's longstanding rules in homicide cases that a defendant in order to rebut the presumption of malice must prove to the satisfaction of the jury that he killed in the heat of a sudden passion and to rebut the presumption of unlawfulness, that he killed in self-defense. The Petition for Writ of Certiorari addressed itself solely to the question of whether the Supreme Court of North Carolina should have given *Mullaney v. Wilbur* retroactive effect in North Carolina.

Petitioner believes that the Supreme Court of North Carolina properly addressed itself at the first opportunity to the question of the applicability of *Mullaney v. Wilbur* to the North Carolina law regarding the burden of proof in homicide cases, and that the Supreme Court of North Carolina recognized the immediate necessity of changing the law of North Carolina in order to comport with due process. Petitioner brought his Petition for Writ of Certiorari for a determination of the pressing question of "retroactivity" raised by the North Carolina Supreme Court's refusal to apply *Mullaney v. Wilbur* retroactively "without further guidance from the [United States] Supreme Court. . .", *State v. Hankerson*, 288 N. C. 632, (1975) at 652 (A. 27). Nevertheless, petitioner will, arguendo, address himself to the question of whether this Court should review the applicability of *Mullaney v. Wilbur* to the law in North Carolina as it stood prior to *State v. Hankerson*.

Respondent acknowledges in its brief that "ordinarily, the state court's definition of its law will be binding" (p. 13, Note 37). The respondent then cites *Bouie v. City of Columbia*, 378 U.S. 347 (1964) as authority for the proposition that the state court's definition of its law will not be binding in "extreme circumstances." (Brief of Respondent p. 13, Note 37). In *Bouie* two black defendants refused to leave a booth in the restaurant department of a drug store, although requested to do so by the store manager. They were convicted in a South Carolina state court of having violated a statute making it a misdemeanor to enter another's lands after notice from the owner or tenant prohibiting such entry. The Supreme Court of South Carolina affirmed the defendants' conviction, the South

Carolina court holding that the terms of the statute which made it a criminal offense *to enter* lands of another after notice from the owner prohibiting such entry, covered the act of *remaining* on the premises after receiving notice to leave. The Supreme Court of the United States reversed, holding that the convictions violated the due process clause of the Fourteenth Amendment in view of the fact that it was not until after the commission of the alleged offense that the South Carolina Supreme Court construed the statute to cover the act of *remaining* on the premises after receiving notice to leave. The Court in *Bouie* stated that an unforeseeable and unsupported state court decision on a question of state procedure does not constitute an adequate ground to preclude United States Supreme Court review of a federal question. Respondent herein does not cite any other authority for the proposition that this Court should review that part of the decision of the Supreme Court of North Carolina which, based upon *Mullaney v. Wilbur*, found the previous rule in North Carolina placing the burden of proof on the defendant to be violative of due process.

Respondent does not state what "extreme circumstances" exist in the case at bar to warrant review of the state court's construction and definition of the term "satisfaction of the jury" by this Court. If any "extreme circumstances" existed in *Bouie* to warrant review by the Supreme Court of the United States, petitioner contends those extreme circumstances were the deprivation of the due process rights of the defendants in that case by the unforeseeable judicial enlargement of a criminal statute by the state court. Respondent having failed to show or even suggest such

"extreme circumstances" in this case, petitioner asserts that the state court's definition of the term "to the satisfaction of the jury" should be binding and not subject to review by this Court.

Respondent, again questioning the wisdom of the North Carolina court, charges that the Supreme Court of North Carolina acted in "haste" in removing "constitutionally suspect rules from its law," and that in so doing it "may have overlooked the recent admonitions from this Court of 'the importance of allowing the States to experiment and innovate especially in the area of criminal justice'." (Brief of Respondent, p. 25, citing *California v. Green*, 399 U.S. 149, 171 (1969) (Chief Justice Burger concurring.) Respondent suggests that North Carolina had properly innovated and experimented over one hundred years ago when it adopted rules in homicide cases which effectively shifted the burden of proof to the defendant to satisfy the jury that he acted either in the heat of a sudden passion to rebut the presumption of malice or in self-defense to rebut the presumption of unlawfulness. Petitioner submits that any innovation and experimentation suggested in *California v. Green* should hardly be interpreted as a license to circumvent the prosecution's burden of proof beyond a reasonable doubt in criminal cases by shifting that burden in any way to a defendant.

CONCLUSION

Based upon the foregoing Reply to Respondent's Brief, petitioner submits that this Court should limit its review of the decision below to the question presented by petitioner of the retroactivity of *Mullaney v. Wilbur* in his case.

Respectfully submitted,

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